

THE ALL INDIA REPORTER

1925

DEDICATED
BY

SHRI AMAR NATH RAINA
(1910-1980)

Former Advocate General,
Jammu and Kashmir.

Bombay Section

CONTAINING

**FULL REPORTS OF ALL REPORTABLE JUDGMENTS
OF THE BOMBAY HIGH COURT REPORTED IN**

- | | |
|-----------------------------|----------------------------|
| (1) I. L. R. 49 BOMBAY | (2) 27 BOMBAY LAW REPORTER |
| (3) 26 CRIMINAL LAW JOURNAL | (4) 85 to 90 INDIAN CASES |

WITH

EXTRA JUDGMENTS

CITATION: A. I. R. 1925 BOMBAY

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1925

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THE ALL INDIA REPORTER

1925

BOMBAY HIGH COURT NOMINAL INDEX

(478 Cases)

Absence of Star denotes Cases of Provincial or Small Importance.

★ Indicates Cases of Great Importance.

★ ★ Indicate Cases of Very Great Importance.

A

* Abdul Aziz Sheikh v. Chandu Sonu	418
Achyut Narayan v. Ramachandra Keshav	362
Ahmed Suleman Jiva v. Rander Town Municipality	345
* Ajitsing Manibhai v. Grunning & Co.	494
* Alimahomed Sale Mahomed v. Municipal Commissioner of Bombay	458
Amarsangji Indrasangji v. Desai Umed	290
Amarsangji Indrasangji v. Ranchhod Jethabhai	294
Amarsanyji Dungarji v. Deepasangji Ravabhai (FB)	241
Ambubai Hanmantrao v. Shankar-sa Nagosa	272
* Amolakchand Laduram v. Motilal Agiariram	497
* Apte, D. S., v. Tirmal Hanmant	503
* Ardeskar Cowasji v. K. D. & Bros.	330
* Atmaram Sakharan v. Vaman Janardhan (F B)	210
** Attorney, an, in re (F B)	1

B

** Bahadurmal Gurmukhrai v. Mohan Lal Surchand	335
Balabhai Raghunath v. Motabhai Babaji	473
* Bala Ramachandra v. Daulu Rama	176
* Ball, John Robert v. Charles William Ball	337
Balvant Vishnu v. Mishrilal	115
Bansidhar Durgadatt v. Tata Power Co., Ltd.	272

* Basappa Rachappa Belkeri, in re	536
Basappa Rudrappa v. Emperor	266
Easayya Ayappa v. Allayya Maharucrayya	328
Becharsang Bhupatsang v. Naran Moti Meghji	277
Bhagavanji Sankleswar v. Ahmadabad Electricity Co.	120
* Bhagvanlal Chunilal v. Bai Divali	445
Bhagwandas Rangildas v. Secy. of State	227
Bhau Vyankatesh Chakorkar, in re	433
Bhikaji Laxman v. Secy. of State	365
* Bhikalal Girdharlal v. Achratlal Lallubhai	341
* Bhikubai Yeshwantrao v. Haribha Swalaram	153
Bhimrao Narasimha v. Emperor	261
Bhimsangji Chhatrasangji v. Dolatsangji Hamersangji	282
* Bombay Baroda & Central India Ry., Co. v. Sukhadia Shankarlal	96
Burjor F. R. Joshi v. Ellerman City Lines, Ltd.	449
Burjorji & Co. v. International Banking Corporation	160

C

Candri Bawco v. Emperor	131
** Cecil Cole v. Nanalal Moraji	18
* Chandulal Suklal v. Dagdu Mahadu	342
Chaturbhuj Sangji v. Marsukhram Motilal	183
* Chhotallal Mohanlal v. Ambalal Hargovan	423
Chimanlal v. Emperor	243
Commissioner of Income tax v. Hajee Jamal Nur Mahomed & Co.	251

- *Commissioner of Income-tax v. Purshottamdas Thakordas 318
 *Coorla Spinning & Weaving Mills Co. v. Vallabhdas Kallianji 547

46 D

- *Darubhai Mithabhai v. Bechar Desai 270
 David Sassoon v. Emperor 259
 *Dayaram Surajmal v. Chandulal Dayabhai 520
 Deekappa Malappa v. Chanbasappa Rachappa 420
 Devakaran Bholaram v. Sangidas Jesiram 386
 **Dhanaji Jhelaji v. Gulabchand Pana 347
 Dhanrajgirji Narsingirji v. W. G. Ward 400
 Dnyanu Yesu v. Vishnu Parsharam 372
 **Dosibai, Bai v. Bai Dhanbai 85
 *Duma Toma Rumav v. Nathu Farsha Kurel 431

56 E

- *Emperor v. Anandrao G. Phanse 529
 ———— v. Basappa Rachappa 526
 * ———— v. Jagardeo Ramsumer 489
 ———— v. Jingagamagi 192
 * ———— v. Krishtappa Khandappa 327
 ———— v. Maria Basappa 135
 ———— v. Namdeo Lakman 138
 ** ———— v. Nathu Kasturchand 170
 ** ———— v. Rachappa Murigeppa 26
 ———— v. Ranchod Harjivan 479
 ———— v. Sahebava Birappa 478
 ———— v. Thakordas Motiram 505

68 F

- Forbes, Forbes, Cambell & Co. v. Official Assignee, Bombay 173

69 G

- Gafur Daud Saheb, *in re* 151
 *Gafur Imam v. Amir Isab 484
 *Ganappa Putta v. Hammad Saiba 440
 Ganpat Chandrabhan v. T. M. Ramchandra 112
 Ganpati Gopal Risbud v. Secy. of State 44
 Ganpati Kondaji v. Maruti Gangaji 522
 Gaurishankar Bhaishankar v. Madhavsangji Jesangji 175
 Ghanshiram Baluram v. Misrilal Chunilal 444
 Girjabai Shivdeorao v. Narayan Rao Ganpat Rao 148
 *Gordhandas Kalyanji v. Goutamchand Rupchand 331
 *Govindaprasad Lalitaprasad v. Rindabai Lalitaprasad 289

- Govind Vasudeo v. Narayan Balwant 439

- *Great Indian Peninsula Ry. Co. v. Haji Tarmahomed 534
 Gulabchand Rupji v. Emperor 467
 *Gulabrao Yeshwant v. Magan Ghelabhai 326
 Gulbaji Ajisigi & Co. v. Rustomji Kharsedji 282

85 H

- **Habib Rowji v. Standard Aluminium and Brass Works, Ltd. 321
 **Hanamgowda Shidgowda v. Irgowda Shidgowda 9
 *Hanmant Gurunath v. Ramappa Lagamappa 292
 **Hanmant Subbaya v. Krishna Manjunath 402
 *Hardayal Shivilal v. Haji Adam Gool Mahomed 344
 **Harichand & Co. v. Gosho Kabushiki Kaisha, Ltd. 28
 *Hari Ramchandra Navare v. G. I. P. Ry. Co. 196
 Hassanalli Degumiya v. Ruhullah Ahmad 305
 *Hirabhai Dahyabhai v. Manek Lal Ranchhod 313
 **Hirachand Amersey v. Jayagopal Gangabishan 69
 *Hussein Abdul Rehman & Co. v. Lakmichand Khetsey 34

96 I

- Ibrahim Fazilbhoy v. International Banking Corporation 252
 *Imambhai Kamrudin v. Rahimbhai Usmanbhai 373
 *Indurai Bbaurai v. Shivilal Nabhubhai 339
 International Banking Corporation v. H. Pestonji & Co. 187

100 J

- *Jadavbai Lakhichand v. Multan-chand Harakh Chand 350
 Jagannath Nathu v. Ichharam Naroba 414
 Jagerdeo Ramsumer Tewari, *in re* 139
 Jamshedji Naoroji v. Maganlal Bankeylal & Co. 314
 *Jivanchand Gambhirmal v. Laxminarayan Ganeshran 511
 Jivanlal Panalal v. Bai Manchha 355
 Jorapur, B. S. v. Venkatesh Balwant 472
 *Jubilee Mills, Ltd. v. Commissioner of Income Tax 257
 Juvansingji Motisingji v. Dola Chhala 390

109	K
Kallappa Ramappa v. Balwant Daso	343
Kalyan Municipality v. Govind Karsan Ramji	419
*Kanaiyalal Nanlal v. Secy. of State	255
Kasturbai, Bai v. Vanmalidas Lakmidas	436
**Kathu Jairam v. Vishvanath Ganesh	470
**Kedarnath Tulsidas v. Beharilal Jagamal	357
*Kesarial Girdharlal v. Jagubhai Hirallal	406
*Keshav Krishna v. Shankar Mahadeo	446
*Kisan Tukaram v. Bapu Tukaram	424
Kishoredas P. Mangaldas v. Ahmed Suleman	516
Kokamal Madhoram v. Gulabsingh Gurudatsingh	248
Kondi Savla Bachal v. Banachand Cheniram	422
**Krishnaji Babaji v. Sangappa Murigappa	181
*Krishnarao Pandurang v. Balwant Keshav	404
123	L
Ladhuram Manormal v. Sale Mahomed	168
**Lakshman Baburao v. Ramchandra Rajaram	22
Lakshman Santu v. Balkrishna Keshav	398
Lalbu, Bai v. Mohanlal Gokaldas	385
Laxman Babaling Gurav v. Vishram Mahadev Rane	209
*Laxman Waman v. Saraswati Ganesh	432
*Limbaji Ravji v. Rabi Ravji	499
139	M
Madhavrao Harbaji v. Ambabai Laxman	125
Mahableswar Deversetti v. Badku Venka	178
*Mahadeo Govind v. Lakshminarayan	521
Mahadev Laxman Satardekar, <i>in re</i>	258
**Mahadev Narain Joshi v. Shridharbhat Gopalbhat Joshi	311
*Mahadev Vitho v. Ganoo Chango	324
Mahomedally Ebrahimji v. Haji Abdulla	167

Mahomed Esmail Fazla, <i>in re</i>	329
Mahomed Roshan v. Emperor	147
Makkama Khadirsahab v. Masabi Abasali	299
Mangal Naran v. Emperor	268
*Manikbai Vishnudas v. Gokuldas Ramdas	363
Mani Lal Chuni Lal v. Mani Lal Damodardas	159
Manilal Jibhai v. Isbvarbhai Samalbhai	367
Manjaya Sannaya v. Seshagiri Shambhuling	129
Martand Trimbak v. Amritrao Raghojirao	501
Maruti Vithu, <i>in re</i>	247
*Megbji Moorji v. Tyeballi Kamrudin	64
Mehbunissa Begum v. Mahedunissa Begum	F B 309
Mody, R. K. & Co. v. Mahomedbhai Abdool Hussein & Co.	378
Mohanlal Motilal v. Harilal Bhogilal	346
*Moos, N. H. v. Abdul Hussain	523
Motilal Gopaldas v. Krishnabai Gopalrao	513
Motiram Hari v. Emperor	195
*Mukundchand Balia v. Sobhagmal Gianmal	79
*Mulchand Manaji v. Jamanbi Abdul Kabir Sahib Kaji	443
Muljibhai Hirabhai Patel, <i>in re</i>	535
*Municipal Corporation of Bombay v. Ranchordas Vandravandas	538
158	N
Nagindas Dahyabhai v. Gordhandas Dahyabhai	480
Naginlal Maganlal Jaichand, <i>in re</i>	543
Nanlal Lallubhai v. Chhotalal Narsidas	519
Narayan Anant Desai v. Emperor	143
Narayan Ganesh v. Sagunabai Gangadhar	193
Nariman Rustomji Mehta v. Hasham Ismayal	137
Narsingacharya Gopalaacharya v. Tulsabai Rambhat	320
Narsingji Mehrmansanji v. Bai Achrat	151
Nilkant Vasudeo v. Balwant Pandurang	431
Nurjan Begam, Bai v. Hunsraj Jethumal & Co.	239
Nur Mahomed Beg Mahomed v. G. Manteth	162
169	O
Over (John) v. Muriel A. I. Over	231

THE ALL INDIA REPORTER

1925 BOMBAY

COMPARATIVE TABLES

(PARALLEL REFERENCES)

Hints for the use of the following Tables :—

TABLE No. I.—This Table shows serially the pages of INDIAN LAW REPORTS for the year 1925 with corresponding references of the ALL INDIA REPORTER.

TABLE No. II.—This Table shows serially the pages of all NON-I. L. R. JOURNALS for the year 1925 with corresponding references of the ALL INDIA REPORTER.

TABLE No. III.—This Table is the converse of the **First** and **Second Tables**. It shows serially the pages of the ALL INDIA REPORTER 1925, with corresponding references of all the JOURNALS including the INDIAN LAW REPORTS.

TABLE No. I.

Showing serially the pages of INDIAN LAW REPORTS, BOMBAY SERIES for 1925 with corresponding references of the ALL INDIA REPORTER.

N. B.—Column No. 1 denotes pages of I. L. R. 49 Bombay.

Column No. 2 denotes corresponding references of the ALL INDIA REPORTER.

I. L. R. 49 Bombay=All India Reporter

ILR	A. I. R.	ILR	A. I. R.	ILR	A. I. R.	ILR	A. I. R.
1	1924 B 473	167	1925 PC 27	245	1925 B 69	368	1925 B 231
25	1925 " 28	172	" B 18	270	" " 369	388	" " 210
40	" " 34	182	" " 120	282	" " 406	440	" " 129
73	1924 " 524	187	" " 129	291	" " 188	442	" " 241
84	" " 502	194	" " 227	305	" " 270	450	" " 268
99	1925 " 12	202	" " 244	309	" " 292	455	" PC 180
113	" " 193	208	" " 239	320	" PC 103	459	" B 153
118	" " 122	212	" " 131	325	" B 85	478	" " 282
126	" " 197	222	" " 139	351	" " 187	505	" " 351
149	" " 137	223	" PC 86	357	" " 400	515	" " 289
152	" " 162	241	" " 111	362	" " 251	520	" " 363

I. L. R. 49 Bombay=All India Reporter.—(Concl'd.)

ILR	A. I. R.	ILR	A. I. R.	ILR	A. I. R.	ILR	A. I. R.
526	1925 B 375	608	1925 B 433	700	1925 PC 211	827	1925 B 534
533	" " 247	615	" " 399	706	" B 469	832	1926 " 115
535	" " 341	619	" " 470	710	" " 436	839	1925 " 521
539	" " 465	623	" " 387	715	" " 321	842	" " 524
548	" " 309	629	" " 357	724	" " 378	847	1926 " 40
554	" " 365	638	" " 344	730	" " 480	854	1925 " 449
562	" " 259	642	" " 529	739	" " 451	860	" " 535
567	" " 516	655	" " 420	759	" " 485	862	1926 " 97
576	" " 499	662	" " 501	785	" " 416	878	" " 71
583	" " 325	672	" " 425	788	" " 543	892	" " 110
586	" " 373	685	" " 415	799	" " 467	902	" " 52
591	" " 484	689	" " 511	804	" " 489	906	" " 103
596	" " 440	693	" " 519	821	" " 514	916	" " 64
604	" " 402	695	" " 503				

TABLE NO. II.

Showing seriatim the pages of other REPORTS, JOURNALS and PERIODICALS for the year 1925 with corresponding references of the ALL INDIA REPORTER.

N. B.—Column No. 1 denotes pages of other JOURNALS.

Column No. 2 denotes corresponding references of the ALL INDIA REPORTER.

27 Bombay Law Reporter=All India Reporter.

BLR	A. I. R.	BLR	A. I. R.	BLR	A. I. R.	BLR	A. I. R.
1	1925 PC 27	175	1925 PC 33	352	1925 B 258	472	1925 B 342
4	1924 " 226	178	" B 244	355	" " 268	474	" " 377
13	1925 B 153	184	" " 305	359	" " 259	477	" " 328
27	" " 160	196	" " 270	363	" " 243	478	" " 318
31	" " 187	198	" " 301	365	" " 289	483	" " 320
34	" " 173	202	" " 239	368	" " 255	485	" " 313
38	" " 176	205	" " 287	371	" " 278	488	" " 311
42	" " 181	208	" " 299	380	" " 282	492	" " 362
48	" " 188	211	" " 292	400	" " 257	495	" " 372
56	" " 162	217	" " 277	403	" " 309	497	" " 325
66	" " 227	219	" " 251	409	" " 347	500	" " 324
73	" " 183	223	" " 247	414	" " 363	503	" " 373
82	" " 178	226	" " 406	419	" " 346	506	" " 369
88	" " 175	241	" " 288	421	" " 367	514	" " 314
91	" " 290	243	" " 272	423	" " 341	525	" " 357
95	" " 168	246	" " 246	426	" " 350	532	" " 355
99	" " 159	247	" " 282	429	" " 345	536	" " 335
102	" " 167	249	" " 431	434	" " 343	541	" " 331
105	" " 170	251	" " 231	437	" " 497	545	" " 344
111	" " 192	267	" " 294	441	" " 465	548	" " 360
113	" " 266	277	" " 248	447	" " 419	551	" " 329
120	" " 261	283	" " 252	449	" " 375	553	" " 330
130	1924 PC 247	290	" " 210	455	" PC 86	556	" " 351
135	1925 " 18	330	" " 272	461	" B 326	564	" " 337
148	" " 1	340	" " 302	463	" " 365	568	" " 469
166	" " 34	345	" " 241	467	" " 339	568	" " 333
170	" " 36	350	" " 247	471	" " 368	570	" " 333

Comparative Tables

27 Bombay Law Reporter=All India Reporter—(Concl'd).

BLR	A. I. R.	BLR	A. I. R.	BLR	A. I. R.	BLR	A. I. R.
574	1925 B 321	753	1925 PC 42	1023	1925 B 505	1279	1926 B 39
581	" " 458	760	" " 93	1031	" " 429	1281	" " 1
595	" " 378	770	" " 83	1034	" " 529	1310	" " 82
599	" " 327	777	" " 80	1039	" " 467	1318	" " 33
604	" " 310	781	" " 111	1043	" " 489	1331	" " 26
607	" " 433	783	" " 91	1056	" " 526	1334	" " 137
612	" " 387	787	" " 75	1058	" " 536	1336	" " 52
616	" " 436	796	" " 63	1063	" " 535	1339	" " 49
621	" " 499	806	" " 61	1064	" PC 139	1343	" " 110
626	" " 512	810	" " 103	1076	" " 181	1351	" " 62
627	" " 439	814	" " 124	1082	" " 196	1353	" " 91
629	" " 484	819	" " 122	1086	" B 516	1363	" " 103
633	" " 445	823	" " 105	1092	" " 532	1371	" " 64
635	" " 431	837	" " 118	1098	" " 449	1373	" " 71
637	" " 440	848	" " 117	1103	" " 514	1388	" " 46
642	" " 402	849	" " 176	1107	" " 542	1391	" " 122
645	" " 435	853	" " 169	1109	" " 472	1405	" " 57
649	" " 414	855	" " 157	1111	" " 534	1415	" " 80
652	" " 418	860	" " 146	1115	" " 522	1416	" " 134
655	" " 442	867	" " 159	1116	" " 472	1419	" " 118
656	" " 430	872	" " 155	1118	" " 520	1421	" " 77
657	" " 389	877	" B 400	1122	" " 527	1427	1925 PC 236
661	" " 417	880	" " 380	1130	" " 538	1441	1926 B 24
663	" " 446	890	" " 390	1140	" PC 211	1446	" " 121
667	" " 422	906	" " 473	1144	" " 203	1449	" " 31
670	" " 424	917	" " 420	1147	" B 523	1451	" " 117
671	" " 443	921	" " 425	1150	" " 521	1453	" " 81
674	" " 399	931	" " 413	1152	" " 524	1456	" " 54
678	" " 404	934	" " 416	1156	" " 513	1460	" " 139
682	" " 470	937	" " 398	1159	1926 " 13	1463	" " 65
685	" " 423	938	" " 415	1168	1925 " 547	1465	" " 131
687	" " 385	941	" " 511	1195	1926 " 18	1471	" " 129
690	" " 444	943	" " 509	1207	1925 " 42	1478	" " 86
692	" " 432	948	" " 477	1216	" " 28	1487	" " 119
694	" " 386	951	" " 501	1218	" " 66	1490	" " 140
699	" " 471	958	" " 476	1229	" " 47	1492	" " 43
701	" PC 52	961	" " 503	1237	" " 115	1494	" " 63
704	" " 180	963	" " 483	1240	" " 107	1496	" " 136
707	" " 130	967	" " 480	1246	" " 40	1500	" " 138
713	" " 11	973	" " 485	1253	" " 55	1503	" " 69
725	" " 55	998	" " 494	1258	" " 97	1507	" " 50
735	" " 49	1003	" " 451	1261	" " 51	1509	" " 90
740	" " 45	1019	" " 479	1273	" " 44	1511	" " 139
746	" " 177	1022	" " 478	1276			

26 Cr. L. J. & 85 to 90 Indian Cases=All India Reporter.

CrLJ & I. C.	A. I. R.	CrLJ & I. C.	A. I. R.	CrLJ & I. C.	A. I. R.	CrLJ & I. C.	A. I. R.
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Please refer to COMPARATIVE TABLE No. II in A. I. R. 1925 Lahore.

TABLE No. III.

Showing seriatim the pages of the ALL INDIA REPORTER, 1925 BOMBAY Section with corresponding references of other REPORTS, JOURNALS AND PERIODICALS including INDIAN LAW REPORTS.

N. B.—Column No. 1 denotes pages of the ALL INDIA REPORTER, 1925 BOMBAY. Column No. 2 denotes corresponding references of other REPORTS, JOURNALS and PERIODICALS.

A. I. R. 1925 Bombay=Other Journals.

A.I.R.	Other Journals.	A.I.R.	Other Journals.	A.I.R.	Other Journals.
1 F B	26 B L R 887	97	85 I C 587	138	85 I C 146
	84 I C 353	104	26 B L R 984		26 Cr L J 466
9	26 B L R 829		87 I C 100	139	26 B L R 1252
	48 Bom 654		26 Cr L J 948		49 Bom 222
	84 I C 374	105	26 B L R 907		85 I C 138
12	26 B L R 847		84 I C 363		26 Cr L J 458
	49 Bom 99	112	48 Bom 214	143	26 B L R 1245
	84 I C 397		26 B L R 118		85 I C 226
18	26 B L R 880		81 I C 284		26 Cr L J 482
	49 Bom 172	113	26 B L R 470	147	26 B L R 1232
22	26 B L R 836		85 I C 778		85 I C 134
	48 Bom 663	115	26 B L R 1194		26 Cr L J 454
	84 I C 378		85 I C 177	148	26 B L R 1165
26	26 B L R 968	118	48 Bom 691		88 I C 975
	83 I C 1006		26 B L R 349	151(1)	26 B L R 1235
	26 Cr L J 222		87 I C 199		26 Cr L J 448
27	76 I C 591	120	26 B L R 1206		85 I C 64
28	26 B L R 921		49 Bom 182	151(2)	26 B L R 1264
	49 Bom 25		85 I C 186		85 I C 204
	86 I C 521	122	26 B L R 1217	153	27 B L R 13
34	26 B L R 934		49 Bom 118		49 Bom 459
	49 Bom 40		85 I C 197	159	27 B L R 99
	84 I C 416	125	26 B L R 1210		86 I C 100
38	86 I C 196		85 I C 193	160	27 B L R 27
44	48 Bom 599	129(1)	26 B L R 1243		86 I C 108
	26 B L R 754		85 I C 160	162	27 B L R 56
	83 I C 370		26 Cr L J 480		49 Bom 152
49	26 B L R 987		49 Bom 440		86 I C 81
	90 I C 580	129(2)	26 B L R 1267		27 B L R 102
64	26 B L R 1019		49 Bom 187	167	27 B L R 95
	90 I C 189		85 I C 207	168	86 I C 96
69	26 B L R 1049	131	26 B L R 1225		27 B L R 105
	49 Bom 245		49 Bom 212	170	86 I C 66
	89 I C 553		26 Cr L J 441		26 Cr L J 690
79	26 B L R 1097		85 I C 57		27 B L R 34
	85 I C 613	135	26 B L R 1240	173	86 I C 118
85	26 B L R 1071		85 I C 149		27 B L R 88
	85 I C 597		26 Cr L J 469	175	86 I C 28
	49 Bom 325	137	26 B L R 1261		27 B L R 38
96	86 I C 393		49 Bom 149	176	86 I C 126
97	48 Bom 673		85 I C 191		27 B L R 82
	26 B L R 1035	138	26 B L R 1236	178	

A. I. R. 1925 Bombay=Other Journals.—(Contd.)

A.I.R.	Other Journals	A.I.R.	Other Journals	A.I.R.	Other Journals
178	86 I C 24	247(2)	86 I C 851	292	86 I C 879
181	27 B L R 42	248	27 B L R 277	294	27 B L R 267
	86 I C 137		87 I C 481		91 I C 265
183	27 B L R 73	251	27 B L R 219	299	27 B L R 208
	86 I C 19		49 Bom 362		86 I C 876
187	27 B L R 31		86 I C 848	301	27 B L R 198
	86 I C 115	252	27 B L R 283		86 I C 867
	49 Bom 351		87 I C 485	302	27 B L R 340
188	27 B L R 48	255	27 B L R 368	305	27 B L R 184
	49 Bom 291		87 I C 475		86 I C 886
	89 I C 35	257	27 B L R 400	309	27 B L R 403
192	27 B L R 111		89 I C 595	FB	49 Bom 548
	86 I C 70	258	27 B L R 352	310	27 B L R 604
	26 Cr L J 694		87 I C 527		87 I C 840
193	49 Bom 113		26 Cr L J 991		26 Cr L J 1016
	26 B L R 1200	259	27 B L R 359	311	27 B L R 488
	85 I C 181		49 Bom 562		87 I C 716
194	26 B L R 1203		26 Cr L J 975	313	27 B L R 485
	85 I C 184		87 I C 431		87 I C 713
195	26 B L R 1223	261	27 B L R 120	314	27 B L R 514
	89 I C 527		86 I C 72		92 I C 9
	26 Cr L J 1391		26 Cr L J 696	318	27 B L R 478
196	88 I C 68	266	27 B L R 113		87 I C 706
197	49 Bom 126		86 I C 145	320	27 B L R 483
	26 B L R 1173		26 Cr L J 705		87 I C 712
	89 I C 539	268	27 B L R 355	321	27 B L R 574
209	76 I C 629		49 Bom 450		88 I C 96
210 FB	27 B L R 290		26 Cr L J 968		49 Bom 715
	49 Bom 388		87 I C 424	324	27 B L R 500
	87 I C 490	270	27 B L R 196		87 I C 735
227	49 Bom 194		49 Bom 305	325	27 B L R 497
	27 B L R 66		86 I C 894		87 I C 723
	86 I C 87	272(1)	27 B L R 243		49 Bom 583
231	27 B L R 251		87 I C 807	326	27 B L R 461
	49 Bom 368	272(2)	27 B L R 330		87 I C 769
	91 I C 20		87 I C 547	327	27 B L R 599
239	49 Bom 208	277	27 B L R 217		87 I C 838
	27 B L R 202		86 I C 846		26 Cr L J 1014
	86 I C 870	278	27 B L R 371	328	27 B L R 477
241 FB	27 B L R 345		88 I C 43		87 I C 710
	49 Bom 442	282(1)	27 B L R 247	329	27 B L R 551
	87 I C 588		87 I C 801		88 I C 77
243	27 B L R 363	282(2)	27 B L R 380	330	27 B L R 553
	87 I C 516		49 Bom 478		88 I C 79
	26 Cr L J 980	287	27 B L R 205	331	27 B L R 541
244	49 Bom 202		86 I C 873		87 I C 1051
	27 B L R 178	288	27 B L R 241	333	27 B L R 570
	87 I C 883		87 I C 804		88 I C 92
246	27 B L R 246	289	27 B L R 365	335	27 B L R 536
	87 I C 820		49 Bom 515		87 I C 1008
247(1)	27 B L R 350		87 I C 472	337	27 B L R 564
	49 Bom 533	290	27 B L R 91		88 I C 86
	87 I C 596		86 I C 31	339	27 B L R 467
	26 Cr L J 996	292	49 Bom 309		87 I C 699
247(2)	27 B L R 223		27 B L R 211	341	27 B L R 423

A. I. R. 1925 Bombay=Other Journals.—(Contd.).

A.I.R.	Other Journals	A.I.R.	Other Journals.	A.I.R.	Other Journals.
341	49 Bom 535	385	27 B L R 687	429	27 B L R 1031
	87 I C 910		89 I C 205		89 I C 1042
342	27 B L R 472	386	27 B L R 694		26 Cr L J 1474
	87 I C 435		89 I C 215	430	27 B L R 656
343	27 B L R 434	387	27 B L R 612	431 (1)	27 B L R 635
	87 I C 951		88 I C 605		88 I C 753
344	27 B L R 545		49 Bom 623	431 (2)	27 B L R 249
	87 I C 1011		26 Cr L J 1181		92 I C 16
	49 Bom 638	389	27 B L R 657	432	27 B L R 692
345	27 B L R 429		89 I C 569		89 I C 211
	87 I C 948	390	27 B L R 890	433	49 Bom 608
346	27 B L R 419		91 I C 272		27 B L R 607
	87 I C 929	398	27 B L R 937		27 Cr L J 69
347	27 B L R 409		89 I C 878		91 I C 245
	87 I C 812	399	27 B L R 674	435	27 B L R 645
350	27 B L R 426		49 Bom 615		89 I C 65
	87 I C 936		89 I C 197	436	27 B L R 616
351	27 B L R 556	400	49 Bom 357		88 I C 709
	49 Bom 505		27 B L R 877		26 Cr L J 1189
	88 I C 81		88 I C 886		49 Bom 710
355	27 B L R 532	402	27 B L R 642	439	27 B L R 627
	87 I C 1043		49 Bom 604		88 I C 668
357	27 B L R 525		89 I C 62	440	49 Bom 596
	87 I C 1026	404	27 R L R 678		27 B L R 637
	49 Bom 629		89 I C 217		89 I C 59
360	27 B L R 548	406	49 Bom 282	442	27 B L R 655
362	27 B L R 492		27 B L R 226		89 I C 108
	87 I C 719	413	27 B L R 931	443	27 B L R 671
363	27 B L R 414		89 I C 990		89 I C 228
	49 Bom 520	414	27 B L R 649	444	27 B L R 690
	87 I C 816		89 I C 87		89 I C 223
365	27 B L R 463	415	27 B L R 938	445	27 B L R 633
	49 Bom 554		49 Bom 685		88 I C 750
367	27 B L R 421		89 I C 881	446	27 B L R 663
	87 I C 934	416	27 B L R 934		89 I C 191
368	27 B L R 471		89 I C 996	449	27 B L R 1098
	87 I C 702		49 Bom 785		89 I C 866
369	49 Bom 270	417	27 B L R 661		49 Bom 854
	27 B L R 506		89 I C 189	451	27 B L R 1003
	87 I C 982	418	27 B L R 652	F B	49 Bom 739
372	27 B L R 495		89 I C 68	458	27 B L R 581
	87 I C 721	419	27 B L R 447		87 I C 771
373	27 B L R 503		89 I C 580	465	49 Bom 539
	87 I C 977	420	27 B L R 917		27 B L R 441
	49 Bom 586		49 Bom 655		87 I C 765
375	27 B L R 449		89 I C 980	467	27 B L R 1039
	49 Bom 526	422	27 B L R 667		49 Bom 799
	87 I C 779		89 I C 220	469	27 B L R 568
377	27 B L R 474	423	27 B L R 685		88 I C 90
	87 I C 696		89 I C 225		49 Bom 706
378	27 B L R 595	424	27 B L R 670	470	49 Bom 619
	87 I C 793		89 I C 196		27 B L R 682
	49 Bom 724	425	27 B L R 921		89 I C 199
380	27 B L R 880		49 Bom 672	471	27 B L R 699
	88 I C 891		89 I C 984		89 I C 213

A. I. R. 1925 Bombay=Other Journals—(Concl'd).

A.I.R.	Other Journals	A.I.R.	Other Journals	A.I.R.	Other Journals
472 (1)	27 B L R 1109	499	49 Bom 576	523	27 B L R 1147
	90 I C 561		27 B L R 621		90 I C 600
472 (2)	27 B L R 1116		88 I C 643	524	27 B L R 1152
	90 I C 656	501	49 Bom 662		90 I C 614
473	27 B L R 906		27 B L R 951		49 Bom 842
	89 I C 934	503	49 Bom 695	526	27 B L R 1056
476	27 B L R 958		27 B L R 961		90 I C 320
	88 I C 1034		88 I C 949		26 Cr L J 1536
477	27 B L R 948	505	27 B L R 1023	527	27 B L R 1122
	89 I C 894		89 I C 1031		90 I C 685
478	27 B L R 1022		26 Cr L J 1463	529	49 Bom 642
	89 I C 1050	509	27 B L R 943		27 B L R 1034
	26 Cr L J 1432		89 I C 889		89 I C 1046
479	27 B L R 1019	511	49 Bom 689		26 Cr L J 1478
	89 I C 1029		27 B L R 941	532	27 B L R 1092
	26 Cr L J 1461		89 I C 885		89 I C 859
480	27 B L R 967	512	27 B L R 626	534	27 B L R 1111
	88 I C 941		88 I C 648		90 I C 562
	49 Bom 730	513	27 B L R 1156		49 Bom 827
483	27 B L R 963		90 I C 604	535	27 B L R 1063
	88 I C 962	514	27 B L R 1103		89 I C 976
484	49 Bom 591		49 Bom 821		26 Cr L J 1456
	27 B L R 629		92 I C 628		49 Bom 860
	88 I C 658	516	49 Bom 567	536	27 B L R 1058
485	27 B L R 973		27 B L R 1086		26 Cr L J 1422
	89 I C 498	519	49 Bom 693		89 I C 846
	49 Bom 759		91 I C 1032	538	27 B L R 1130
489	27 B L R 1043	520	27 B L R 1118		90 I C 695
	49 Bom 804		90 I C 689	542	27 B L R 1107
	26 Cr L J 1526	521	27 B L R 1150		90 I C 558
	90 I C 310		90 I C 610	543	27 B L R 1207
494	27 B L R 998		49 Bom 839		91 I C 160
497	27 B L R 437	522	27 B L R 1115		49 Bom 788
	87 I C 953		90 I C 654	547	27 B L R 1168

THE ALL INDIA REPORTER

1925 BOMBAY

I. L. R. ALPHABETICAL INDEX

of cases reported in

I. L. R. 49 BOMBAY.

WITH REFERENCES TO THE PAGES OF

The All India Reporter

[98 Cases]

Names of parties	I. L. R. pp.	A. I. R. pp.
Amarsangji Dungarji, Jhala v. Deepsangji Pawabhai	... FB 442	1925 B 241
Apte, D. S. v. Tirmal Hanmant	... 695	" " 503
Atmaram Sakharam, Kalkye v. Vaman Janardhan Kashelkar	FB 388	" " 210
Bai Dosibai v. Bai Dhanbai	... 325	1925 B 85
Bai Kasturbai v. Vanmalidas Laxmidas	... 710	" " 436
Bai Noor Jan Bagam v. Hansraj Jethamal & Co.	... 208	" " 239
Bhagwandas Rangildas v. Secretary of State for India	... 194	" " 227
Bhagwanji Sankleshwar v. Ahmedabad Electricity Co., Ltd.	... 182	" " 120
Bhau Vyankatesh Chakorker, <i>in re</i>	... 608	" " 433
Bhikaji Laxman v. Secretary of State for India	... 554	" " 365
Bhikhalal Girdhardas v. Acharatlal Lallubhai	... 535	" " 341
Bhikubai Yeswantrao meher v. Hariba Sawalaram	... 459	" " 153
Burjor F. R. Joshi v. Ellerman City Lines, Limited	... 854	" " 449
Cole, A. Cecil v. Nanalal Morarji	... 172	1925 B 18
Commissioner of Income-Tax, Bombay Presidency v. Haji Jamal Nur Mahomed & Co.	362	" " 251
Dadachanji v. Ratanbai	... PC 167	1925 PC 27
Darubhai Mithabhai v. Bechar Desai	... 305	" B 270
Deekappa Mallappa v. Chanbasappa Rachappa	... 655	" " 420
Dhanrajgirji Narsinggirji v. Tata Sons, Ltd.	... 1	1924 B 473
Dhanrajgirji Narsinggirji, Raja v. W. G. Ward	... 357	1925 B 400
Emperor v. Abdul Gani	... 878	1926 B 71
— v. Chandri Bawoo	... 212	1925 B 131
— v. David Sassoon	... 562	" " 259

Names of parties			L. I. R. pp.		A. I. R. pp.	
Emperor v. Jagerdeo Ramsumer Tewari	804	1925 B	489
— v. Manant K. Mehta	892	1926 B	110
— v. Mangal Naran	450	1925 B	268
— v. Piru Rama Hawaldar	916	1926 B	64
— v. P. B. Ponde	623	1925 B	387
— v. Ranchhod Sursang	84	1924 B	502
— v. Shafi Ahmed	642	1925 B	529
Gafur Imam v. Amir Isab	591	1925 B	484
Ganapa Putta v. Hammad Saiba	596	" "	440
Giriappa Sabanna v. Govindrao Ganrao	902	1926 B	52
Govindprasad Lalitaprasad Mishar v. Rindabai	515	1925 B	289
G. I. P. Railway Company v. Haji Tarmahomed Hasam	827	" "	534
Gulabchand Rupaji, <i>in re</i>	799	" "	467
Gulbaji Ajisiji & Co. v. Rustomji Kharshetji Banatwalla	478	" "	282
Habib Rowji v. Standard Aluminium & Brass Works, Ltd.	715	1925 B	321
Hanumant Gurunath v. Ramappa Lagmappa	309	" "	292
Hanmant Subbaya v. Krishna Manjinath	604	" "	402
Harichand & Co. v. Gosho Kabushiki Kaisha	25	" "	28
Hirachand Amersey v. Jayagopal Gangabishan	245	" "	69
Hoosein Abdul Rehman & Co. v. Lakshmichand Khetsey	40	" "	34
Hunmantrao v. King-Emperor	PC 455	" PC	180
Hurdayal Shivilal v. Haji Adam	638	" B	344
Hurnandrai Fulchand v. Pragdas Budhsen	PC 241	1925 PC	111
Imambhai Kamruddin v. Rahimbhai	586	1925 B	373
International Banking Corporation v. H. Pestonji & Co.	351	" "	187
Jagerdeo Ramsumer Tewari, <i>in re</i>	222	1925 B	139
Jagubhai Hiralal v. Kesarlal Girdharlal	282	" "	406
Jivanchand Gambhirmal v. Laxminarayan Ganeshram	689	" "	511
Kathu Jairam v. Vishwanath Ganesh	619	1925 B	470
Kedarnath Tulasidas v. Beharimal Jagarmal	629	" "	357
Kishoredas P. Mangaldas v. Ahmed Suleman	567	" "	516
Limbaji Ravji Hajare v. Rahi Ravji Hajare	576	1925 B	499
Mahadeo Govind v. Lakshminarayan Ramratan	839	1925 B	521
Manikbai Vishnudas v. Gokuldas Ramdas	520	" "	363
Manjaya Sannaya Shanbhag v. Sheshgiri Shambhuling	187	" "	129
Martand Trimbak v. Amritrao Raghojirao	662	" "	501
Maruti Vithu, <i>in re</i>	533	" "	247
Mehbunissa Begum v. Mehmedunnissa Begum	FB 548	" "	309
Mody & Co., R. K. v. Mahomedbhai Abdool Hoosein & Co.	724	" "	378
Motilal Hirabhai v. Bai Mani	PC 233	" PC	86
Nagindas Dahyabhai v. Gordhandas Dahyabhai	730	1925 B	480
Naginlal Maganlal Jaichand, <i>in re</i>	788	" "	543
Nanlal Lallubhai v. Chhotalal Narsidas	693	" "	519
Narayan Ganesh Patankar v. Sagunabai	113	" "	193
Narayan Keshav v. Kaji Gulam Mohidin	832	1926 B	115

Names of parties.		I. L. R, pp.		A. I. R. pp.	
Nariman Rustomji Mehta v. Hasham Ismayal	...	...	149	1925 B	137
Nowroji Rustomji Wadia v. Government of Bombay	...	PC	700	" PC	211
Nur Mahomed Beg v. District Magistrate, Poona	...	...	152	" B	162
Over, John v. M. A. I. Over	...	...	368	1925 B	231
Patel Muljibhai Hirabhai, <i>in re</i>	...	...	860	1925 B	535
Pereira, A. M. v. D. P. Demello	...	...	440	" "	129
Rachappa Chanbasappa v. Ningappa Bassappa	...	...	847	1926 B	40
Raghavendra Gururao v. Mahipat Krishna	...	...	202	1925 B	244
Royal Bank of Scotland v. Rahim Cassum & Son	...	...	270	" "	369
Sakharam Narayan Patwardhan v. Balakrishna Sadashiv Modak	...	FB	739	1925 B	451
Secretary of State for India v. Bhaskar Krishnaji	...	...	759	" "	485
_____ v. G. I. P. Railway Company	...	PC	320	" PC	103
_____ v. Girjabai	...	...	126	" B	197
_____ v. Shantaram Narayan Dabholkar	...	...	99	" "	12
Shankerbhai Manorbhai Patel v. Motilal Ramdas Shah	...	...	118	" "	122
Shivlingappa Nijappa v. Gurlingava	...	...	906	1926 B	103
Shripad Dattatraya v. Vithal Vasudeoshet	...	...	615	1925 B	399
Shripad Gopalkrishna v. Basappa Rudrappa	...	...	785	" "	416
Sundrabai Vithal Deshpande v. Laxman Ramchandra	...	...	583	" "	325
Suryanarayan, Peruri v. W. L. Narsimha	...	...	685	" "	415
Tarabai Ramrao v. Dattaram Govindbhai	...	...	539	1925 B	465
Tukaram Mahadu v. Ramachandra Mahadu	...	...	672	" "	425
Vadilal Raghavji v. Manecklal Mansukhbhai	...	...	291	1925 B	188
Vallabhdas Meghji v. Cowasji Framji & Co.	...	...	706	" "	469
Vaman Trimbak v. Changi Damodar	...	...	862	1926 B	97
Ved and Sopher v. R. P. Wagle & Co.	...	...	505	1925 B	351
Vidyavardhak Sangh Co. v. Ayyappa Sangirimallappa	...	...	842	" "	524
Vishnu Ramenandra Deshpande v. Tukaram Ganu	...	...	526	" "	375
Vishvanathbhat Annabhat v. Mallappa Ningappa	...	...	821	" "	514
Waman Martand Bhalerao v. Commissioner, Central Division	...	...	73	1924 B	524

[98 Cases]

THE
ALL INDIA REPORTER
1925 BOMBAY

LIST OF CASES OVERRULED

Hansa v. Bhawa, 40 Bom. 333=18 Bom. L. R. 22.	Overruled in	A. I. R. 1925 Bom. 309 (F. B.)
Jamsang Devabhai v. Goyabhai Kikabhai, 16 Bom. 408.	"	A. I. R. 1925 Bom. 241 (F. B.)
Subba Rama Hegde v. Venkatasubba Hegde, A. I. R. 1924 Bom. 434	"	A. I. R. 1925 Bom. 210 (F. B.)

ABBREVIATIONS EXPLAINED.

All. or A.	....	Indian Law Reports, Allahabad Series.
A. L. J.	....	Allahabad Law Journal.
A. I. R. 1925 All.	....	All India Reporter, 1925 Allahabad.
Bom. or B.	....	Indian Law Reports, Bombay Series.
Bom. L. R.	....	Bombay Law Reporter.
A. I. R. 1925 Bom.	....	All India Reporter, 1925 Bombay.
Bur. L. T.	....	Burma Law Times.
Bur. L. J.	....	Burma Law Journal.
Cal. or C.	....	Indian Law Reports, Calcutta Series.
C. L. J.	....	Calcutta Law Journal.
C. L. R.	....	Calcutta Law Reports.
C. W. N.	....	Calcutta Weekly Notes.
A. I. R. 1925 Cal.	....	All India Reporter, 1925 Calcutta.
Cr. L. J.	....	Criminal Law Journal.
I. A.	....	Law Reports, Indian Appeals.
I. C.	....	Indian Cases.
Lah. or L.	....	Indian Law Reports, Lahore Series.
A. I. R. 1925 Lah.	....	All India Reporter 1925 Lahore.
Lah. L. J. or L. L. J.	....	Lahore Law Journal.
L. B. R.	....	Lower Burma Rulings.
A. I. R. 1922 L. B.	....	All India Reporter 1922 Lower Burma.
L. R. (P. C.)	....	The Law Reporter, Privy Council Sec.
L. R. (A)	....	Allahabad Section.
Mad. or M.	....	Indian Law Reports, Madras Series.
M. L. J.	....	Madras Law Journal.
M. L. T.	....	Madras Law Times.
L. W. or M. L. W.	....	Madras Law Weekly.
M. W. N.	....	Madras Weekly Notes.
A. I. R. 1925 Mad.	....	All India Reporter, 1925 Madras.
N. L. J.	....	Nagpur Law Journal.
N. L. R.	....	Nagpur Law Reports.
A. I. R. 1925 Nag.	....	All India Reporter, 1925 Nagpur.
O. & A. L. R.	....	Oudh and Agra Law Reporter.
O. C.	....	Oudh Cases.
A. I. R. 1925 Oudh	....	All India Reporter, 1925 Oudh.
O. L. J.	....	Oudh Law Journal.
O. W. N.	....	Oudh Weekly Notes.
P. R.	....	Punjab Record.
P. L. R.	....	Punjab Law Reporter.
P. W. R.	....	Punjab Weekly Reporter
Pat. or P.	....	Indian Law Reports, Patna Series.
P. H. C. C.	....	Patna High Court Cases (Supplement to C. W. N.)
A. I. R. 1925 P.	....	All India Reporter, 1925 Patna.
A. I. R. 1925 P. C.	....	All India Reporter, 1925 Privy Council
Pat. L. R.	....	Patna Law Reporter.
Pat. L. J.	....	Patna Law Journal.
Pat. L. W.	....	Patna Law Weekly.
R. or Rang.	....	Indian Law Reports, Rangoon Series.
A. I. R. 1925 Rang.	....	All India Reporter, 1925 Rangoon.
Sar.	....	Saraswati P. C. Judgments.
S. L. R.	....	Sind Law Reporter.
Suther.	....	Sutherland P. C. Judgments.
A. I. R. 1925 Sind	....	All India Reporter, 1925 Sind.
U. B. R.	....	Upper Burma Rulings.
U. P. L. R.	....	U. P. Law Reporter.
A. I. R. 1922 U. B.	....	All India Reporter, 1922 Upper Burma.

OTHER ABBREVIATIONS.

Appl.	....	Applied.	Diss.	....	Dissented from.	P. C.	....	Privy Council.
Appr.	....	Approved	Expl.	....	Explained.	Ref.	....	Referred to
Dist.	....	Distinguished.	Foll.	....	Followed.	S. B.	....	Special Bench.
Disc.	....	Discussed.	F. B	....	Full Bench.			

THE ALL INDIA REPORTER 1925

BOMBAY HIGH COURT SUBJECT INDEX

Absence of Star denotes Cases of Provincial or Small Importance.

★ Indicates Cases of Great Importance.

★ ★ Indicate Cases of Very Great Importance.

Abatement

—See CIVIL P. C., O. 22

—Appeal—See CIVIL P.C., O. 22 R. 9

Adjournment

—See CIVIL P. C. O., 17 R. 1

Adjustment of Suit

—See CIVIL P. C., O. 23 R. 3

Adverse possession

*—Equity of redemption cannot be acquired by adverse possession—Possessory mortgage—Trespasser in possession holds adversely to mortgagee and not mortgagor 465

**—Right to open shutters and maintain weather frames is acquirable by adverse possession 385

—Vacant site between two houses belongs to neighbour 27

Amendment of Order.

—See CIVIL P. C., S. 152

Amendment of Pleading

—See CIVIL P. C., O. 6, R. 17

Arbitration Act (9 of 1899)

—S. 4—Bill-of-lading giving option to one party only to choose forum—There is no submission within S. 4 449

*—S. 9 (a) and (b)—Reference to two arbitrators one by each party—Arbitrators refusing to act—Each party has right to appoint another in place of it retiring arbitrator—On refusal

Arbitration Act

by one party other party can appoint sole arbitrator 469

B

Benamidar

—Suit by or against benamidar binds the real owner 422

Bombay Bhagdari and Narvadari Act (Bom. Act 5 of 1862)

—S. 1—Separation of a portion of narva land by proprietor—Recognition of the portion by Collector as separated sub-division—Such portion must be considered as a recognised sub-division 476

Bombay City Municipal Act (Bom. Act 3 of 1888)

*—Private rights cannot be interfered with beyond limited powers conferred by statute 458

—S. 63 (k)—Building quarters for Municipal servants is for promoting public convenience—Such a matter is within the discretion of the Municipality and Court of law cannot interfere 536

—S. 63. (k)—Contemplation by Municipality for utilization of the ground floor for shops cannot disentitle it from proceeding with the scheme 538

—S. 147—Additional Municipal tax—Tenant liable to pay such tax—Notice is not necessary 532

Bom. City Municipal Act

- S. 515 — Private and public nuisances can be remedied by injunction by one or all residents affected—Court can order refusal to grant license for stables but the order does not govern all cases of license for stables 458

Bombay City Police Act (Bom. Act 4 of 1902)

- Ss. 70, 72 and 74—Accused though arrested under requisition from Magistrate are in police custody 387

Bombay District Municipal Act (Bom. Act 3 of 1901)

- Ss. 42, 54 and 58, R. 3—Rules under S. 58R. 3—Primary schools—Government inspection disallowed—Maintenance of schools is not 'misapplication'. 278
- S. 65 (1)—Levy of sanitary cess under S. 59 (vii)—No notice under S. 65 (1) issued—Levy is not illegal 419
- S. 96 — Municipality cannot order grant of permission amounting practically to refusal 345
- Ss. 96, 92 and 91 (a)—Permission to build—Permission subject to keeping land within regular line of street unbuilt upon is legal—Building beyond the line is an offence 505

Bombay Hereditary Offices Act (Bom. Act 3 of 1874)

- S. 5—Mortgagee from Watan-dar is liable to pay mesne profits if he retains possession after mortgagor's death 325
- S. 15—Widow holding life interest in watan property is not 'holder.' 365
- S. 73—Non compliance with the procedure laid down in section makes order ultra vires 365

Bombay High Court Circulars.

- Ch. 23, R. 16—Receivers other than Official Receivers—Receiver's remuneration should be proportionate to the amount of dividend distributed 472

Bombay High Court, Original Side

- Pleader, costs of, before Taxing Master are not allowed 355
- Taxation—Party taking review must pay costs—Taxing Master

Bom. High Court Ori. Side

- can make the party taking review pay costs of the other party 355

Bombay Land Revenue Code (Bom. Act 5 of 1879)—

- Ex-parte grant of sanad at City Survey confers no title 430
- S. 83—Existence of tenancy shown for nearly 80 years—Origin not known — Tenancy should be presumed to be permanent and ancient 390
- S. 83 — Tenancy traceable to the time of foundation of village in particular year—Origin of tenancy may yet be shown to be indefinite 294
- S. 83—Proviso—' Usage ' has to be proved by landlord 390
- S. 84—Annual tenancy—Disclaimer of landlord's title causes forfeiture — Notice to quit is unnecessary 524
- S. 84 — 10 days' notice is invalid 294
- S. 121 — Civil suit lies from decision of Survey Officer on a title dispute 151
- S. 133—Sanad is a document of title — Entries in Collector's books are not much evidence of title — Sanad holder need not prove possession within 12 years of suit 477
- S. 217 — Section does not affect contractual rights arising before the survey 435

Bombay Mamlatdars' Courts Act (Bom. Act 2 of 1906)

- S. 23 — Application to Collector for revision must not be rejected without hearing applicant or his pleader 522

Bombay Pleaders Act (17 of 1920)

- Ss. 17 to 19 — No special agreement between pleader and client—Pleader dying before final decree — Proportionate fees on basis of quantum meruit only can be claimed 513

Bombay Prevention of Prostitution Act (Bom. Act 11 of 1923)

- Ss. 3 and 10 (1)—Arrest by police officer without complaint is illegal — Magistrate

Bom. Prevention of Prostitution Act

has no jurisdiction to try the accused 131

Bombay Rent (War Restriction, Act (Bom. Act 2 of 1918)

—Notice to quit given while the Act is in force — Fresh notice is not necessary after the Act ceases to apply 516

—Premises occupied mainly for dwelling purposes—Tenant also carrying on business in the premises — Premises are to be deemed as used as dwelling-house 398

—S. 2—Sub-tenant let in without landlord's consent is not a "tenant" with respect to original landlord. 415

—S. 6—City of Bombay Municipal Act (3 of 1888), S. 147—Additional Municipal tax—Tenant liable to pay such tax—Notice is not necessary 532

—S. 10 A—Defendant applying for restoration and becoming successful on merits—Act expiring in the meantime before order was passed in his favour—Proceedings ipso facto terminate and defendant cannot succeed 378

—S. 13 — House held under lease—Part of premises let out by lessee — Rent of part sub-let forms basis of standard rent 400

Bombay Revenue Jurisdiction Act (10 of 1876)

—S. 4 (a)—Order of commutation of watan services passed without observing Bombay Hereditary Offices Act, S. 73—Suit to set aside order lies 365

Bombay Survey and Settlement Act (Bom. Act 1 of 1865)

—Ss. 37 and 38 — Terms of Kabuliyat to Government must conform to custom except as altered by Ss. 37 and 38. 44

Bombay Wagering Act (3 of 1865)

—S. 1—Agreement to pay differences—Settlement by cross-contract—Agreement is of wagering nature under S. 1 though not under Contract Act, S. 30 511

Broach and Kaira Incumbered Estates Act (Bom. Act 21 of 1881)

—S. 28 — Estate taken under management — Disability continues even in the case of successor of the Thakor 175

C**Cantonments House Accommodation Act (6 of 1923)—**

—Ss. 30 and 7 — Notice issued under S. 7—Person aggrieved can appeal under S. 30 — No other remedy is open 162

City of Bombay Local Acts

—See BOMBAY CITY LOCAL ACTS

Civil Procedure Code (5 of 1908)

—S. 2 (17)—Official Assignee is a public officer within S. 2 (17) 344

—S. 9—Suit chiefly with respect to the right to receive offering and incidentally to the right to worship is maintainable 209

*—S. 11 — Application to file awards registered as suit,—Abatement ordered for non-joinder of representatives—Second suit to recover money due is not barred 418

—S. 11—Gujarat Talukdars Act (Bombay Act VI of 1888) — S. 16 — Decision of Dt. Judge under S. 16 does not bar a regular suit on the principle of res judicata F B 241

*—S. 11—Several mortgages on the same property and in favour of same mortgagee—Mortgagor suing for accounts under S. 15 D of the Dekkhan Ag. Rel. Act on one mortgage—Mortgagee claiming account to be taken of other mortgages also—Court deciding suit only with respect to one mortgage—Subsequent suit on other mortgages by mortgagee is not barred 311

*—S. 11, Expl. IV—Might and ought—Suit for specific performance of a contract of sale—Relief as to possession need not be asked 181

*r.—S. 11—Expl. V—Relief asked for in plaint but not referred to in judgment—Decision as to that

Civil P. C.

- relief found to be unnecessary—
No res judicata 181
- S. 24—High Court in insolvency jurisdiction cannot withdraw insolvency proceedings pending with a Sub-Judge in the presidency 543
- *—S. 34—Decree for partition and for accounts—Section does not apply 406
- S. 34—Interest on damages—Where a party improperly delays the ascertainment of damages for a long time he should be penalized with from date interest of suit 547
- S. 34—Mortgage suit—Interest allowed from date of suit only so as to make interest equal to capital—Interest also allowed in case of default in payment from date of payment—Award of interest was held proper 362
- S. 35—No appeal lies from order under S. 35 432
- *—S. 35—Privy Council appeal presented but not prosecuted—Costs on petition for leave to appeal to Privy Council are to be paid by appellant 471
- *—S. 35—Several defendants—Suit dismissed against all—Each defendant is entitled to costs on the basis of suit valuation 432
- S. 35—When costs do not follow event, reasons must be given—Plaintiff who is not guilty of misconduct is not disentitled to his costs 527
- S. 47—Decree for specific performance of contract for sale—Question of judgment-debtor damaging property after decree can be gone into by executing Court 385
- *—S. 48—Decree passed before new Code came into force—Section applies 326
- S. 48—Instalment decree ceasing to be so on default—Court cannot restore decree to original status 326
- *—S. 48 (1) (b)—Subsequent order means any order made by a competent Court—Order of executing Court allowing time for judgment-debtor to pay up

Civil P. C.

- the balance of decretal amount is a subsequent order and gives a fresh period for executing the decree 503
- S. 63—Execution of decree—Attachment of property by First Class Subordinate Judge—Subsequent attachment and sale by Second Class Subordinate Judge—First Class Subordinate Judge is entitled to call for sale proceeds to his Court for rateable distribution 420
- Ss. 65 and 63—Property sold in execution of two decrees—Purchaser at the unconfirmed sale gets no title to property 483
- S. 91—Suit for removal of encroachment in public street—Plaintiff unable to prove that the rest of the street cannot be used—Suit is not maintainable 367
- **—S. 95—Suit for damages for attachment before judgment on insufficient grounds—Attachment not effected—No cause of action exists 357
- S. 100—Gujarat Talukdar's Act (Bom. Act VI of 1888), S. 16—No second appeal lies to the High Court from a decision of the Dt. Judge under S. 16 of the Gujarat Talukdars Act: 16 *Bom.* 408, *Overruled* **F B** 241
- *—S. 100—Whether a specific instance as to custom is proved is a question of fact—Objection as to general insufficiency of evidence may be gone into in second appeal 380
- *—S. 102—Suit as framed not a small cause—Plaintiff omitting a portion of claim subsequently—Suit does not change its character 440
- S. 110—Value in partnership suits is calculated on the appellant's share and not the whole property 137
- S. 115—Decree passed on an award—Revision is competent 341
- *—S. 115—Interference is discretionary and not obligatory 341
- *—S. 144—Decree against Defendants 1 and 2 for damages—Plaintiff appealing on ground of

Civil P. C.

- his being entitled to specific performance against Defendant 3
 —Defendant 1 paying decree money pending appeal—Plaintiff succeeding in appeal—Defendant 1 is entitled to interest while withdrawing his money 313
- S. 152—Court sale under an order erroneously stating larger sum as due cannot be set aside for the error 389
- O. 1, R. 1—Suit for enhanced rent against tenant for excess land—All cosharer landlords must join 542
- *—O. 2, R. 3—Five persons making five contracts with the same defendant—One suit by all five on the contract is not maintainable 342
- O. 6, R. 17—Substitution of new plaintiff cannot be allowed 248
- O. 7, R. 10—Order under—No second appeal lies 431
- *—O. 7, R. 10—Plaint returned for presentation to proper Court—Plaintiff appealing—Appeal dismissed—Plaintiff can then present it to proper Court 418
- O. 8, R. 9—Court's permission is necessary for filing pleadings in reply to defendant's written statement. 390
- O. 9, R. 8—Dismissal under—Remedy by review is not competent 521
- *—O. 9, R. 9—Plaintiff arriving late in Court but on the same day—Suit if already dismissed for default, should be restored on payment of costs if any 423
- O. 9, R. 9—S. 5 of Lim. Act does not apply to applications under O. 9, R. 9. 521
- O. 11, R. 21—Defendant disobeying Court's order—Defendant should be allowed opportunity to show cause—Defence should be struck out if defendant is guilty of wilful neglect 386
- O. 12, R. 1—Order as to affidavit of documents obtained against defendant—Defendant dying—Representatives brought on record—Fresh order as to affidavit must be obtained against representatives 386

Civil P. C.

- *—O. 16, R. 1—Plaintiff applying for summons to witnesses eleven days prior to hearing—Court is bound to issue summons 368
- *—O. 17, R. 1—When notice for the discovery of documents has been posted to the hearing of the suit, but on the day so fixed no judgment is given on the notice, adjournment of hearing of the suit may be refused 105
- O. 17, Rr. 2 and 3—Failure of plaintiff to appear at adjourned hearing—Court should proceed under R. 2—Trial Court and not the appellate Court can consider if plaintiff had good reasons for non-appearance 328
- O. 20, R. 18—Partition suit—Preliminary decree silent as to interest—Interest can be awarded in a proper case 406
- **—O. 21, R. 2—Uncertified payment—Executing Court cannot recognize—40 B. 333. *Overruled* **F B** 309
- *—O. 21, R. 52—Moneys in Official Assignee's hands payable to judgment-debtor are attachable 344
- O. 21, R. 63—Mortgage of property—Money decree passed against mortgagor's vendor and the property sold—Auction purchaser obstructed in taking possession by mortgagee—No adverse order in claim proceedings passed against mortgagor—Mortgage is valid 413
- O. 22, Rr. 4 and 9—Appeal decreed in ignorance of appellant's death—Decree is nullity—Only Court decreeing the appeal can deal with application under R. 9 290
- O. 22, Rr. 4 (3) and 9 and S. 107 (2)—Appeal abating against one respondent does not necessarily abate against the others though both may be tenants-in-common 122
- *—O. 23, Rr. 1 and 3—Compromise effected—Subsequent withdrawal by plaintiff is not permissible 425
- *—O. 23, R. 1—In some cases Plaintiff cannot withdraw 425

Civil P. C.

- *—O. 23, R. 1—Second suit dismissed for non-compliance with condition on which permission was granted—Third suit is barred 272
- O. 23, R. 3—Mortgage suit compromised—Compromise allowing realization from property other than that mortgaged—Compromise is lawful 509
- *—O. 30, R. 1—It is not correct to sue persons as partners in the name of the firm by a partner or the manager 494
- *—O. 30, R. 3—Proviso—Partnership dissolved to plaintiff's knowledge—One partner not served—Decree passed—Firm is liable under the decree though the partner not served is not bound 331
- *—O. 30, R. 6—Written statements of all partners are written statements of the firm—Personal defence can be put in only if a person is sued personally along with the firm 494
- *—O. 34, R. 14—Money decree under a different mortgage—Rule does not apply 239
- *—O. 47, R. 1 and O. 9, R. 8—Dismissal under O. 9, R. 8—Remedy by review is not competent. 521
- *—Sch. 2, para 11—Scope is limited to question of law 22
- Sch. 2, Art. 20—Suit to enforce award is maintainable though no order for filing the award is obtained 418
- Sch. 3, para. 1—Mortgage decree — Executing authority may mortgage the property to satisfy decree 277

Companies Act (7 of 1913)

- *—S. 21—Limited company has statutory right to amalgamate itself with another company and no express power in the Memorandum of Association is necessary for the purpose 49
- S. 79(i) and of Sch. 1 Table A.—Notice calling General Meeting to consider amalgamation of bank with another bank is bad if there is any secret benefit received by the Directors under

Companies Act

- the arrangement and it is not disclosed in the notice 49
- S. 81—Amendment may be allowed subject to the nature of the resolution and that of the amendment. 49
- S. 202—Application under S. 153 by Company which is not being wound up—Order on application is not appealable 442
- S. 203 (2)—Mixing up of different matters in same resolution is legal 49
- S. 213—Mere omission to authorize in terms the liquidators to receive compensation and distribute it among shareholders does not make a resolution illegal under the section 49
- S. 213 (5)—Mixing up of different matters in same resolution is legal 49

Company

- Amalgamation with another Company is not confined to formation of new Company to carry on business of the old—There must be sale of assets as a whole in return for shares in purchasing Company 49
- Meeting—Amendment — Disallowing proper amendment vitiates resolution—But amendment which amounts to rejection of the resolution is illegal 49
- Meeting—Amendment—Rejection is proper if contrary to Court's order 105
- Meeting—Amendment to resolution lost on show of hands—Poll demanded and taken—But before declaration of result of poll, demand for poll and other amendments withdrawn and new amendment allowed—Original resolution is not invalidated 49
- Meeting—Closing doors during taking of poll—Chairman is justified if special precautions are necessary 105
- Meeting—Evidence of proceedings—The minutes of a meeting are prima facie evidence of what happened at the meeting 49
- *—Meeting—Minutes are prima facie, though not conclusive evidence of proceedings—Chairman's declaration of the result of

Company

- polls will be presumed to be correct until contrary is proved —When meeting is held and Chairman acts under orders of Court, Court has some control as to evidence attacking validity of proceedings 105
- Meeting—Objection to validity of votes must be handed in before the commencement of the poll—It must particularize the votes objected to 49
- Meeting—Point of order assailing competency of the meeting to consider the proposed resolution, which is long enough to form a speech against the resolution may be properly ruled out as a point of order 49
- **—Meeting—Presumption is in favour of validity of proceedings unless the invalidating fact is established beyond reasonable doubt 49
- Meeting—Right of speech—A shareholder is entitled to be heard in reasonable terms for a reasonable time—The question whether the denial of this right vitiates the resolution itself intended to be opposed by him depends on the circumstances of each case—If it is practically certain that his speech would not have made any difference in the situation, the resolution will stand—Though technically a speaker may seem to elect not to speak, yet, if it may be inferred from the circumstances that if he spoke he would be prevented from doing so, he would be held to be prevented from speaking 49
- *—Meeting—Validity of votes —Plaintiff disputing validity can claim inspection and discovery of documents —But refusal of inspection is not wrong so as to merit reversal by superior Court where delay is bad and where inspection is not likely to benefit plaintiff 105
- *—Shareholder misappropriating Company's goods—Majority supporting the act—Minority can sue 188
- Shares applied for on misreading of prospectus—Applicant

Company

cannot resile—"Friends of directors" include business friends 272

Construction

- See DEED — CONSTRUCTION
- See CONTRACT—CONSTRUCTION
- See LEASE—CONSTRUCTION

Contract

- **—An agreement is not a hire purchase agreement unless hirer has option not to complete purchase 18
- Breach of contract — Where date of sale is postponed by consent, old contract continues but date of breach is the postponed date if date is fixed, or the date when plaintiff refused to extend time or after reasonable time from last date of grant of indulgence 547
- Construction — Court should lean towards a construction favouring the validity of the contract rather than its illegality 115
- *—Contract by minor's natural guardian for minors benefit — Minor is bound—Minor can sue for damages for breach of contract of marriage 97
- Kacchi Adat—Kaccha Adatia in Bombay makes contracts on behalf of up-country constituent with third parties — The third parties are responsible to the constituent for losses — Constituent's name is not disclosed to the third party—But the third party's name is disclosed to the constituent—Both the constituent and the Adatia are responsible to the third party 79
- Teji Mandi transactions should not be presumed to be wagering transactions 79
- **—Waiver must be with intention to waive and with knowledge of all circumstances—Payment by vendee of purchase money, due to mistake induced by advice of solicitors is not waiver of right under covenant for title 64
- Contract Act (9 of 1872)**
- **—S. 11 — Contract by natural guardian — Minor benefited — Minor is bound—Marriage con-

Contract Act

- tract—Breach — Minor can sue for damages 97
- **—S. 23 — Pleader agreeing to take as fees part of suit property in case of success — Agreement is void 470
- *—S. 24—Agreement by client to pay to pleader a sum of money and part of suit property as inam "for religious purposes"—Agreement is inseparable and whole is void 470
- *—S. 30 — Agreement to pay differences—Settlement by cross contract — Agreement is of wagering nature within Bombay Act III of 1865, S. 1, though not under Contract Act, S. 30 511
- *—S. 30—Contract was held not to be a wagering one notwithstanding stipulation to pay difference between contract price and market price in the event of breach of contract by either party 115
- **—S. 30 — Wagering contract—Intention to deal only in differences must be common to both parties 79
- S. 30 — Wagering contract—Teji Mandi transactions should not be presumed to be wagering transactions 79
- *—Ss. 64 and 65—Sale of minor's property by stepmother—Purchase money applied in discharging mortgage executed by minor's father—Marriage expenses of minor defrayed out of the money — Sale can be set aside but purchase money must be refunded 499
- **—S. 73 — Clause empowering vendor, on vendee's default to pay on due date, to resell at any time and on such terms and conditions as vendor might decide is valid, provided vendor acts within its limits 28
- S. 73—Plaintiff must mitigate loss—Vendor with right to resell at any time, on vendee's default to pay by due date need not resell immediately but must do so within reasonable time—Otherwise he can get damages only on basis of difference between con-

Contract Act

- tract and market rates at date of breach 28
- **—S. 107 — Clause empowering vendor, on vendee's default to pay on due date, to resell at any time and on such terms and conditions as vendor might decide, is valid, provided vendor acts within its limits 28
- S. 107—Plaintiff must mitigate loss due to breach of contract by the deft.—Vendor with right to resale at any time, on vendee's default to pay by due date, need not resell immediately but must do so within reasonable time—Otherwise he can get damages only on basis of difference between contract and market rates at date of breach 28
- S. 107—Sale must be within reasonable time 547
- *—S. 107—Where vendor retains ownership he is entitled to difference between contract rate and market rate on date of breach, but must mitigate damages as far as possible—Where title has passed to vendee, vendor may recover price though vendee has not taken delivery or may sue for breach of contract even after resale of goods — In latter case damages are the difference between contract rate and market rate when contract ought to have been completed 547
- *—S. 140—The word 'invested' dispenses with necessity of assignment 547
- *—S. 145 — Surety keeping alive his liability by payments within time — Decree against surety—Creditor's remedy against principal debtor barred by limitation — Payment by surety under decree—Surety's act in keeping alive his liability is not wrongful 244
- *—S. 178 — "Goods" includes "share certificates" 314
- *—S. 178 Proviso — 'Fraud' in the proviso implies total absence of consent 314
- *—S. 230—Agent can sue in his own name if he has an interest in the contract 547

Contract Act

- *—S. 253—Mortgage to firm—
Release of property by one is
useless unless he is authorized
by all partners 69
- *—S. 253—Partner failing to
carry out duties imposed on him
—Suit for dissolution—Partner
is not liable for probable loss 324
- **—S. 253 (6) — One partner
assigning his interest to a third
party—Assignee cannot claim
accounts from other partners
nor can he sue for dissolution 347

Costs

—See CIVIL P. C., S. 35.

Court fees Act (7 of 1870)—

- S. 7 (iv) (c)—Declaration
sought that plaintiff was owner
of certain Toda Giras Hak
annuity and entitled to recover
same—S. 7 (iv) (c) applies—
Same value applies for jurisdic-
tion purposes as for Court-fees 282

Covenant running with land

—See T. P. ACT, S. 40.

Criminal Procedure Code (5 of 1898)

- S. 147 (1)—Right to take
religious car in procession along
public road is covered by sub-
S. (1) 536
- S. 147 (2) and (3)—Merely
not passing order under sub-S.
(2) does not justify order under
sub S. (3) 536
- *—S. 147 (2)—Proviso — Right
not exercised in proper season
due to obstruction by opposite
side—Proviso does not apply 536
- S. 164—Magistrate of Native
State recording accused's ex-
planation for purpose of Extradit-
ion Rules is not recording state-
ment of accused in investigation
under Ch. 14 529
- S. 195—Sanction granted after
new Code came into operation
is illegal 151
- S. 195 (1) (c)—“Court” does
not include Court in Native
State 535
- S. 195 (c)—Document produc-
ed in a case—Production may
be by another than the alleged
offender 433
- S. 195 (c)—Document ten-

Criminal P. C.

- dered out returned by presiding
Judge is ‘produced in evidence’ 467
- *—S. 203—Dismissal of com-
plaint does not bar fresh com-
plaint, but complainant must
inform Magistrate about previ-
ous dismissal 258
- S. 250 (3)—Appeal lies when
compensation exceeds Rs. 50
whether payable to one or more
accused 129
- S. 253—Obligation under S.
256 is different from that under
S. 342 170
- S. 263 (h)—Non-compliance is
curable under S. 537, if convic-
tion is right 138
- S. 288 (1923)—“Provisions”
are not limited to Ss. 155 and
157 of Evidence Act 266
- S. 339 (1)—Certification by
Public Prosecutor is absolutely
necessary 135
- S. 342—Accused is to be ex-
amined after all evidence against
him is over 170
- S. 342—Obligation under S.
256 of the Criminal P.C. is differ-
ent from that under S. 342 170
- S. 362 (1) and (2)—Strict com-
pliance is necessary even where
the accused is to be sent to
Dharwar Juvenile Jail 147
- S. 435—Withdrawal of cases
by superior Court under S. 435
suspends jurisdiction 217
- S. 439—Appeal pending—
Notice for enhancing sentence
should not be issued till dismis-
sal of appeal 268
- S. 476—Notice though not
legally necessary is expedient 436
- S. 476—Proceedings heard by
one Judge—Direction can be
granted by another 436
- S. 488 (1)—Children—Offer to
maintain in future is no bar to
passing order 259
- S. 562—Section applies even
where imprisonment is obliga-
tory. (But see S. 562 as
amended) 192
- S. 562 (1 A)—Proviso to the
section applies to whole sec-
tion including sub-S. (1 A)
newly added — Third Class
Magistrate cannot exercise
powers under sub-S. (1 A)

Custom

- *—Proof—Three instances 25 years old were held sufficient to prove that custom was ancient 380

D**Deed**

- *—Construction—A Hindu's will devising his entire property to his wife with powers of alienation in case of necessity was held not to curtail her powers to legal necessity, the reference to necessity being held as only the ordinary aversion of an owner to alienate save when necessary 38
- Construction—Circumstances surrounding a document may be proved only to make its meaning clear and not to prove it to be something else than what it purports to be 501
- Construction—Head-lessee not bound to renew head-lease—Covenant to allow renewal to sub-lessee if and when renewal is obtained by head-lessee—Sub-lessee cannot claim right to renewal in perpetuity 64
- *—Construction—Question is not so much of parties' intention as of meaning of words used 12

Dekkan Agriculturists' Relief Act (17 of 1879)

- Privileges under the Act are personal—They cannot pass by assignment or devolution 501
- S. 10 A—Section applies only when an agriculturist is party to suit 501
- S. 10 A—Section is retrospective in effect 112
- S. 15 B—Lim. Act. Art. 182 (2)—Instalments decree—Instalments become payable after date of appellate decree 270

Divorce Act (4 of 1869)

- Ss. 10, 12, 13 and 14—Wife admitting adultery—Caution against collusion is essential 231
- S. 11—Adulterer's name not known—Court should not lightly excuse absence of enquiry 231
- S. 45—Civil P. C., O. 5, R. 17—Personal service of petition should be insisted on 231

E**Easements Act (5 of 1882)**

- *—S. 15—Easement of projecting

Easements Act

branches of trees growing on one's land over the land of another cannot be acquired by prescription

446

- *—S. 18—Projecting branches of one's trees on another's land cannot be a customary easement 446

Electricity Act (9 of 1910)

- Sch. Cl. (vi.) paras 4 and 5 and S. 22—Written requisition is necessary for transfer of connection 120

Estoppel

- See EVIDENCE ACT, S. 115

Evidence

- Admissibility—Cancellation of a stamp on a bundi at a later date and not at the time of execution is not valid 520
- *—Admissibility in evidence of an insufficiently stamped document is to be decided from the document and not from collateral circumstances 527
- Meeting—The minutes of a meeting are prima facie evidence of what happened at the meeting 49

Evidence Act (1 of 1872)

- S. 11—Former judgment more than 25 years old and convicting accused of decoity is admissible in a case under S. 401 I. P. C. for showing criminal tendency to theft and not habit of committing theft 195
- *—S. 24—Threats made but not influencing accused—Confession is admissible 529
- *—S. 25—Confession made to police officer—Accused merely repeating before Magistrate the fact and contents of the previous confession—Statement to Magistrate is inadmissible in evidence 529
- *—S. 25—Incriminating statement to police officer, though on the face of it self-exculpatory is inadmissible 529
- Ss. 26, 74 and 80—"Police Officer" and "Magistrate" in S. 26 include "Police Officers" and "Magistrates" of Native States—But as to procedure disregard of the Criminal P. C. or local law does not affect admissibility of record in British India 529
- S. 47—"Habitually" refers to invariability of practice 429

Evidence Act

- S. 54, Expl. (2) -- Former judgment more than 25 years old and convicting accused for dacoity is admissible in a case under S. 401, I. P. C., for showing criminal tendency to commit theft and not habit of committing theft. 195
- S. 58—Divorce cases—Generally section does not apply 231
- S. 58—No pleading put in—Admission of facts by party by his pleading does not exist 231
- S. 92—Sale by father as manager of joint Hindu family—Other members cannot dispute nature of transaction. 288
- * —S. 92, proviso 1—Suit to invalidate document for fraud is different from one to declare that a document is not what it purports to be 501
- S. 92 proviso 6 — Circumstances surrounding a document may be proved only to make its meaning clear and not to prove it to be something else than what it purports to be 501
- S. 114 — Non production of evidence raises adverse presumption 294
- S. 114, Ill. (b)—Accomplice corroborated on material points —Judge can believe other statements of accomplice though uncorroborated 261
- S. 114, Ill. (i)—An application can be presumed to have been made if facts justify presumption 443
- S. 115 — Mortgagee cannot dispute mortgagor's title to property 125
- ** —S. 115—Vendor and vendee both advised by same solicitors —Both sharing same mistake as to vendor's title, due to solicitors' advice — Vendee paying purchase money and vendor utilizing it to obtain transfer—Defect in title of vendor discovered—Vendee is not estopped from claiming back purchase money as vendor did not act on faith of vendee's representation 64
- * —S. 126—Giving out matter which is already a disclosed fact is not forbidden **F B** 1

Evidence Act

- S. 126—Presence of the client's friend when professional communications are made to an attorney does not affect attorney's obligation to keep the communications secret **F B** 1
- ** —S. 126—Where legal practitioner is engaged by two parties he cannot make any disclosures in proceedings between a third party and one of his clients without consent of both of his clients though as between them there can be no secrecy **F B** 1
- S. 126—Absence of litigation or of prospect thereof at the time the confidential communications are made is no excuse for disclosure **F B** 1
- * —S. 126—Disclosure of advice given by another person is also forbidden **F B** 1
- * —S. 126—Privilege.—The obligation continues after the employment has ceased **F B** 1

Execution

- * —Decree though binding on executing Court it can relieve a party against consequences of default 404
- Right to—Person having no right at the date of application but acquiring the right subsequently cannot execute decree 472

Execution of Decree

- Instalment decree ceases to be so on default. 326

Extradition Act (15 of 1903)

- S. 10 (4) — Magistrate has power to grant bail to accused who has been arrested under S. 54 (7) of the Criminal P. C., and whom, the Magistrate has been asked by the Magistrate of a Native State to retain in custody—If the arrest is under S. 33 (g) of the Bombay City Police Act, but other facts remain the same, the same rule applies 104

F**Factories Act (12 of 1911)**

- Possession both of employee and employer should be looked to 143
- S. 18 (2)—Procedure as to service of notice or order should be strictly followed — Mere

Factories Act

knowledge is not enough—Visit note by Inspector is not an order 143

Foreigners Act (3 of 1864)

—S. 1 as amended by Act. 3 of 1915, S. 2—Cession of territory by Britain to another State—British subject ceases to be such on cession—Residence in British India for trade purposes does not change status of foreigner 489

—Ss. 3 and 3 A—Government must issue orders about detention or release or removal without delay—Commissioner of Police cannot do any such thing without such orders 139

Forest Act (7 of 1878)

—Ss. 75 (d) and 84—Rule by Local Govt. under S. 75 (d), prohibiting withdrawal of tenders before acceptance is not ultra vires 485

(8 of 1880)

—S. 84—Section does not apply to all consequences of rescission of contract 227

Frame of Suit

—See CIVIL P. C., O. 2.

Fraudulent Transfer

—See T. P. ACT, S. 53.

G**Guardian and Ward**

*—Sale of minor's property by minor's stepmother—Purchase money applied in discharging mortgage executed by minor's father—Marriage expenses of minor defrayed out of the money—Sale can be set aside but purchase money must be refunded 499

Guardians and Wards Act (8 of 1890)

—S. 30—Sale by guardian without Court's permission—Sale is valid till set aside by minor 320

Gujrat Talukdars Act (Bombay Act 6 of 1888)

—Decision of Dt. Judge under S. 16 does not bar a regular suit on the principle of res judicata

F B 241

—S. 16—No second appeal lies to the High Court from a decision of the Dt. Judge under S. 16 of the Act: 16 Bom. 408
Overruled 177/14 F.B. 241

H**Hindu Law**

**—Adoption—Adopted son may enforce his right to property alienated by his adoptive mother prior to adoption, without setting aside the transfer. 9

**—Adoption—Adoptee married and having daughter—Estate in natural family vests in adoptee's daughter 263

*—Adoption—Brahmins—Non-sa-goira boy—Datta hom is essential 289

**—Adoption—Husband's brother can be validly adopted. 399

—Alienation—Father—Sons' share can be sold in execution of decree against father

—Alienation—Minor—Alienation by mother to pay prior mortgage—Purchaser is not bound to see that money was properly disposed of 514

—Alienation—Widow—Consent of presumptive reversioners at the date of alienation does not estop actual reversioners—Surrender in favour of one is not equal to surrender at all 159

**—Alienation by widow—First adopted son dying, second son adopted—Second son can challenge independently 402

—Custom—Kadwa Kunbis—Property inherited by a childless woman from her father—After her death property devolves on her father's relations and not on her husband 380

*—Debts—Under Mitakshara sons must pay mother's debts though daughter inherits the balance after paying debts 125

*—Decree against father as manager—Whole interest of family passes under the sale unless proclamation states otherwise 497

*—Joint family—Father becoming insolvent—Father's power to alienate family property for just purposes does not vest in Official Assignee 416

*—Maintenance—For fixing amount of bare maintenance reference to Commissioner is not necessary 153

Hindu Law

- *—Maintenance — Unchastity—
Return to chastity—Bare main-
tenance will be allowed 153
- Partition — Reunion is not
proved by mere statement 350
- Partition between father and
son—Grandson is presumed to
continue to be joint with his
father 350
- *—Reversioner may enforce right
without setting aside widow's
alienation 9
- *—Succession—Adopted son in
Bombay takes one-fourth of the
share of a subsequently born
natural son, even among Sudras 425
- *—Succession—Bandhus — Vya-
vahara Mayukha—Father's sis-
ter's son is preferred to mater-
nal uncle **F B** 451
- *—Succession—Bombay School—
Daughters take absolute estate
by inheritance as tenants-in-
common 424
- Succession — Coparceners.
Two separated coparceners suc-
ceeding to the estate of a third
separated coparceners inherit
as tenants-in-common 350
- *—Succession—Mayukha system
—Sons of predeceased brothers
take along with surviving
brothers 406
- *—Widow — Alienation—Legal
necessity—Payment of husband's
debt and performance of his
obsequial ceremonies are a legal
necessity 38
- *—Widow—Alienation—The posi-
tions of adopted son and that
of reversioner in regard to
alienation by widow are the
same but for the fact that the
former's rights commence on
adoption and the latter's after
widow's death 9
- *—Widow's estate—Stridhan—
Wife living separately from her
husband—Property inherited
from her father—Will by wife
without husband's consent is
valid 445
- *—Will—Devise in favour of wife
—Grant of absolute ownership
is enough and no express words
granting power of alienation
specifically are necessary to
entitle the wife to transfer 38

Holder for Value

—See. NEG. INSTR. ACT, S. 9.

I

Inam

- Construction—Grant should
be construed strictly in favour
of Government 112
- Question as to grant being
of soil or of share of revenue is
one of fact—Presumption that
grant passes only share in
revenue does not exist 12
- *—Right to mines—Express
words in the grant are not neces-
sary for the transfer of the right
to mines and minerals in the
lands granted 12

Income tax Act (7 of 1918)

- S. 26—Section does not pro-
vide for appeal to Commissioner 257
- S. 51—Application for refund
—S. 51 does not apply 257
- (11 of 1922)
- S. 2 (14)—Income-Tax rules—
Application for registering must
be made on or before due date
of return under S. 22 (2). 247
- *—S. 4 (3) (vii)—Remuneration
obtained for selling cotton of a
firm—Assessee himself a cotton
merchant—Remuneration is not
exempt from tax 918
- S. 10 (1) (ix)—Payment on
capital advanced, out of profits
is not expenditure solely in-
curred 251

Injunction

- See SPECIFIC RELIEF ACT, S.
55.

Interpretation of Statutes

- Where intention is plain Court
cannot scan wisdom of legisla-
ture 505

K

Khot

- See BOMBAY SURVEY AND
SETTLEMENT ACT (1 OF 1865),
Ss. 37 & 38.

L

Land Acquisition Act (1 of 1894)

- *—S. 6 (3)—Provision that the
notification under sub-S. (3) is
conclusive evidence of the sanc-
tion of the scheme does not
disentitle a claimant to get a
declaration that the Board acted

Land Acqn. Act

ultra vires in framing the scheme 538

Landlord and Tenant

*—Lease—Covenant not to assign without lessor's consent—Consent unreasonably refused—Lessee can assign 302

—Suit for enhanced rent for excess land—All cosharer landlords must join 542

—Watan lands—Tenant of watan lands cannot acquire right to fixity of rent by adverse possession 375

Land Tenure

—Nadgi tenure—Neglect of tenant to cultivate lands and rebuild the fallen house justifies his eviction 178

—'Saranjam'—Grant of royal share of revenue—Resumption of grant does not operate on mirasi or occupancy right of khatedar acquired by saranjamdar during continuance of grant 197

Lease

—Construction—Head lessee not bound to renew head-lease—Covenant to allow renewal of sub-lease if and when renewal is obtained by head-lessee—Sub-lessee cannot claim right to renewal in perpetuity 64

—Construction—Rent note silent as to payment of assessment—Assessment enhanced—Tenant must pay excess over the rent fixed 168

Legal Practitioner

*—Lien of solicitor—Judgment-creditor attaching assets of judgment debtor—Lien can be enforced 351

—Mode of defence should not give rise to adverse presumption against practitioner (F B) 1

—No special agreement between pleader and client—Pleader dying before final decree—Proportionate fees on basis of *quantum meruit* only can be claimed 513

—Proceedings against—Rule should be brought on for hearing as quickly as possible (F B) 1

*—Proceedings against—Rule should be served on the representative body of the legal pro-

Legal Practitioner

fession to enable them to press the view of the profession (F B) 1

—Professional misconduct—Courts' discretion is to prevail as to hearing private party when proceedings against a practitioner have been taken by the Advocate-General (F B) 1

Letters Patent (Bombay)

—Cl. 12—Mortgage property outside jurisdiction—Suit to determine rights of competing mortgagees—Court has no jurisdiction 333

*—Cl. 15—Order allowing transfer of summary suit to short causes—No appeal lies 159

—Cl. 15—Whole case, and not only the point in difference, can be considered 118

Lien

—See LEGAL PRACTITIONER.

Limitation Act (9 of 1908)

—S. 5—Section does not apply to application under Civil P. C., O. 9, R. 9 521

—S. 5 and Art. 179—Time taken up for review should be excused 137

—S. 14—Proceeding taken in right Court but continued in a wrong Court justifies exclusion of time occupied by proceeding in wrong Court 113

—S. 22—Nonjoinder—Joinder after limitation of proper but not necessary parties is not fatal. 547

*—S. 22—Substitution of the names of coparceners is only correction of misdescription and not addition of parties and the section does not apply 527

—Art. 44—Joint Hindu family—Alienation of property by elder brother as manager—Suit by a minor brother on attaining majority for recovery of property—Art. 44 does not apply 372

*—Art. 44—Ward transferring the property—Transferee and ward suing within 3 years of ward's majority to set aside alienation by ward's guardian—Suit is not barred 292

*—Art. 62—Suit to recover money paid under protest—Limitation

Lim. Act

- starts not from the demand of payment but from the date of payment 435
- *—Art. 91—Adopted son may enforce his right to property alienated by his adoptive mother prior to adoption, without setting aside the transfer 9
- *—Art. 91—Hindu Law—Reversioner may enforce right, without setting aside widow's alienation 9
- **—Art. 112—Articles of company creating liability to pay remaining calls even on forfeiture—Shares of defendant forfeited by a resolution—Cause of action for suit to recover the amount of unpaid calls arises on the date of forfeiture 321
- *—Art. 116—"Compensation" includes a sum certain 440
- Art. 116—Purchaser of immovable property obstructed in getting possession—Suit for refund of purchase money is governed by Art. 116 440
- *—Art. 116—Words "Express or implied" in Art. 115 should also be read in Art. 116 440
- *—Art. 120—Raising party wall by one with acquiescence of the other adjoining owner—Opening windows therein in the raised portion will amount to trespass—Art. 120 applies 373
- Art. 120—Scope—A suit to enforce an award comes under Art. 120 519
- Arts. 134 and 148—Transferee from mortgagee with constructive notice of mortgage cannot rely on Art. 134 417
- *—Art. 144—Overt act is necessary to make possession of equity of redemption adverse—Paying mortgage-debt and taking possession of mortgaged property may amount to such an act 9
- *—148—Mortgage executed in 1761—Acknowledgement alleged in 1858—Suit to redeem filed in 1916—Suit is barred 339
- *—Art. 158—When special case is stated limitation runs after Court expresses opinion 22
- Art. 164—Ex-parte decree—Application to set aside—If ap-

Lim. Act

- plication had been duly served limitation runs from the date of of decree 444
- Art. 182—Application for execution to a Court before the property of the defendant passed under jurisdiction of another Court, is step-in-aid—Procedure after transfer of property indicated 414
- *—Art. 182—Step-in-aid—Oral application to pay money lying in Court is a step-in-aid 443
- *—Art. 182 (2)—Instalments become payable after date of appellate decree 270

M

Mahomedan Law

- *—Gift—Declaration of intention, transfer in Government Register and asking tenants to attorn to donee are enough to effect delivery 305
- *—Marz-ul-maut—Deed executed during—Onus of proof lies on party attacking 305
- *—Marz-ul-maut—Proximate danger of death, subjective apprehension of death, and inability to attend to ordinary avocations are essential 305

Maintenance.

—See—CRIMINAL P. C. S. 488

Master and Servant

—See—TORT.

Minor

- Contract by natural guardian for minor's benefit—Minor is bound—Minor can sue for damages for breach of contract for marriage 97
- Right to sue—A minor can sue as a bearer of a Shah jog hundi 527

Motor Vehicles Act (8 of 1914)

- Ss. 5 and 18 (2)—Dangerous driving—Fine should be proportionate to means of accused—In case of professional drivers the best course is to exercise powers under S. 18 (2) 526

N

Negotiable Instrument

- Bill revolving at 30 days' sight—Revolving commences after due date and not the date of payment 160

Negotiable Instruments Act (26 of 1881)

- S. 9—Holder having lien on the bill is a holder for value 369
- S. 33—Draft against individual personally accepted by him on behalf of Corporation—Acceptance is invalid 252
- Ss. 50 and 13—Hundi payable to payee or bearer—Endorsement by payee in favour of a named person—Hundi ceases to be payable to bearer 173
- S. 118 — Provisions of section do not apply to a question of admissibility in evidence of a document 527

Neighbours

- Vacant site between houses presumably belongs to neighbours 27

New Plea

- See PRACTICE—NEW PLEA.

Nuisance

- See also CIVIL P. C., S. 91.
- Public nuisance—Keeping of many horses in a crowded locality may become public nuisance 458

P

Pardanashin Lady

- Deed by—Onus of proof is on party benefited—Degree of onus varies according as deed is injurious or not to lady 305

Partnership

- Partner failing to carry out duties imposed on him—Suit for dissolution—Partner is not liable for probable loss 324

Party Wall

- *—Raising party wall by one with acquiescence of the other adjoining owner—Opening windows in the raised portion will amount to trespass—Art 120 applies 373

Penal Code (45 of 1860)

- *—S. 29—Letters imprinted on trees for distinction and identification are 'document' 327
- S. 161—Favour need not actually be shown 261
- *—S. 294 A—Publication of terms for prices on horses winning at Derby races is offence 243
- **—S. 294 A—Publication that tickets of unauthorized lottery are sold at particular place is

Penal Code—

- not sufficient to constitute an offence under S. 294 A 26
- S. 304 A—Causing death of child—Accused attempting to commit suicide by jumping in a well with child on her neck—Child dying in consequence—Accused's mind in abnormal state at the time and accused, unconscious of child's presence—Offence is one under S. 304 A but not under S. 302 310
- S. 372—Tying talimani to minor girl worshipping basin of water, distributing food are preliminary step to selling for prostitution and do not constitute offence under the section

Pensions Act (23 of 1871)

- S. 4—Covers cash allowance in commutation of kulkarni services 148

Possession

- *—Suit for injunction restraining disturbance of possession based on—Prima facie title proved by plaintiff—Better title must be proved by defendant 377

Possessory Title

- Unless contrary is proved, open space in a street belongs to the owners of surrounding houses 27

Practice

- New plea—Plea as to jurisdiction may be raised in appeal 162
- *—Precedent—Old authorities deserve special importance as, many rights may have been founded thereon 12
- *—Right to sue—Court should lean in favour of its existence 188

Precedent

- See PRACTICE—PRECEDENT.

Presidency Small Cause Courts Act (10 of 1882)

- S. 41—Sub-tenant is an occupant 415

Presidency Towns Insolvency Act (3 of 1909)

- Transaction between creditor and insolvent behind the back of the official assignee is void 346
- S. 18—High Court in Insolvency jurisdiction cannot withdraw insolvency proceedings pending with a Sub-Judge in the presidency 543

Pesy. Towns Ins. Act

—S. 24—Section enables staying its own proceedings and not of another Court 543

—S. 36. Cls. 4 & 5—Clauses do not apply to cases where insolvent alleges fraud practised on him by mortgagee 329

Presumption

—See EVIDENCE ACT, S. 114.

Provincial Insolvency Act (5 of 1920)

*—S. 13—A person is adjudged insolvent on the date on which the order is made, though effect of such order relates back to earlier date—Voluntary transfer by a person is voidable only if made within two years from the date of the adjudication order

—S. 56—Receivers other than Official Receivers—Receiver's remuneration should be proportionate to amount of dividend distributed 472

Provincial Small Cause Courts Act (9 of 1887)

—S. 23—S. C. Suit transferred to regular list—Retransfer to S. C. list is barred 246

—Art. 13—Kulkarni watan—Commutation allowance—Suit for share in allowance does not fall under Art. 13 489

—Art. 24—Small Cause Court can try a suit to recover what is awarded to plaintiff by an award 519

—Art. 35 (j)—Claim for refund of tax illegally recovered with interest as damages—Suit is not cognisable by Small Cause Court 419

R**Railways Act (9 of 1890)**

*—S. 72—Risk-note B—Consignment—Missing of contents of some packages does not amount to loss of complete package 534

S. 72—Rules under the Act—R. 34-A, does not apply if railway offers different goods from those consigned for despatch 196

—S. 76—Risk note executed—S. 76 does not apply 96

Receiver

*—Estate of a deceased person in Receiver's hands—Money suit against deceased's heirs—Ex-

Receiver

parte order permitting plaintiff to add receiver as party—No decree can be passed against the Receiver 523

Registration Act (16 of 1908)

—S. 17 (1) (b)—Order by inamdar to village officers that certain lands be continued as theretofore for services, is not compulsorily registrable 194

—S. 21—Description of property as "godown bearing No. 3 Port Trust number of which is...in the New Rice Market at Carnac Bander Port Trust "Bombay" was held sufficient, though cadastral survey number of property was omitted 34

*—S. 28—Property included in a deed only to give jurisdiction to Sub-Registrar—Deed registered Intention of parties to reconvey the property after registration does not invalidate registration 514

—Ss. 77, 72 and 21—Refusal to admit document to registration is covered by S. 72—Suit lies under S. 77 where Registrar upholds Sub-Registrar's order refusing under S. 21 to accept document for registration on ground of want of sufficient description 34

Return of Plaintiff

—See CIVIL P.C., O. 7, R. 10.

S**Second Appeal**

—See CIVIL P.C., S. 100.

Specific Performance

*—Offer to sell—Offer not accepted by offeree—Offeree dying—Legal representatives cannot sue for specific performance 431

Specific Relief Act (1 of 1877)

*—S. 41—Sale of minor's property by stepmother—Purchase money applied in discharging mortgage executed by minor's father—Marriage expenses of minor defrayed out of the money—Sale can be set aside but purchase money must be refunded 499

*—S. 45—Suit to declare electoral lists illegal and restrain elections thereunder—S. 45 applies 255

*—S. 54—Suit for declaration and injunction — Impending

Sp. Rel. Act

breach of rights proved—Allegation as to past breach not proved
—Suit is not liable to dismissal in toto 301

—S. 55—Affirmative covenants should not be enforced against assignee—English principles should not be applied 183

Stamp Act (2 of 1899)

—S. 2 (11)—Admissibility in evidence of an insufficiently stamped document is to be decided from the document and not from collateral circumstances 527

*—S. 12—Cancellation of a stamp on a hundi at a later date and not at the time of execution is not valid 520

—S. 14—Bill-of-exchange—Period of payment extended by drawer and accepted by drawee—Bills must be charged afresh 187

Step-in-aid

—Of Execution—See LIM. ACT, ART. 182.

Succession Act (10 of 1865)

—S. 69—Previous clause in Will giving property as "gift"—Subsequent clause directing disposal after the donee's death—Legatee was held to take life interest 282

Suits Valuation Act (7 of 1887)

—S. 8—Declaration sought that plaintiff was owner of certain Toda Giras Hak annuity and entitled to recover same—S. 7 (IV) (c) of the Court-fees Act applies—Same value applies for jurisdiction purposes as for Court-fees 282

T**Tort**

**—Master and servant—Servant slightly deviating from master's instructions is not acting beyond the scope of his employment 360

—Wrongful arrest—Decree against the estate of the deceased—Wrong order by the Court to arrest the heir in execution—Arrest in execution—Decree-holder is liable 118

Transfer of Property Act (4 of 1882)—

—S. 40 *Quaere* whether S. 40 applies to affirmative covenants involving expenditure of money 183

T. P. Act

—S. 40—Covenant to pay ground-rent runs with land 330

—S. 41—Charge created by decree on property—Owner of such property is not ostensible owner and cannot pass title to a transferee for value without notice 343

*—S. 41—Property transferred by Muhammadan husband to his wife as Mahr.—Husband remaining ostensibly as owner—Transfer of some property to daughter-in-law as mahr is operative 299

*—S. 52—Transfer of suit property by person who was subsequently brought on record as legal representative of original defendant is not void 176

*—S. 53—Hollow transaction—Section applies 287

*—S. 55—Purchaser obstructed in getting possession—Suit for refund of purchase money is governed by Lim. Act, Art. 116 440

**—S. 55 (1) (a)—Non-disclosure of restrictive covenant contained in the conveyance to vendors from original owners and of vendor's breach thereof entitles vendee to repudiate contract—Mere reference to the existence of some covenant without mentioning even its purport is not enough—When the restrictive covenant is that no building should be built within certain distance of certain boundary, merely stating that the property is a building estate and the purchaser should erect boundary walls in conformity with the covenant contained in the conveyance to the vendor from the original owners, is not sufficient disclosure on vendor's part and vendee can repudiate contract where the other terms of his contract with the vendee profess to confer an unencumbered interest subject to certain specific conditions mentioned, none of which affects the question involved in the restrictive covenant—But vendee will lose his right to repudiate unless

T. P. Act

he does so immediately on discovering the true facts. But unless he has waived his rights in the matter he can insist on vendor curing defect in title by giving reasonable notice to the latter and, if vendor fails to do so, vendee may repudiate contract

85

—S. 55 (1)(a)—Purchaser is not expected to enquire title deeds of adjoining property—Vendor must disclose covenants if any burdening the property sold

183

*—S. 55 (1) (b) and (d)—Subject-matter of sale mortgaged to a firm—Vendee is entitled to prove that all partners of the firm agreed to reconvey property to vendor—Mere release deed signed by one partner is not sufficient

69

*—S. 76—Mortgage of leasehold—Mortgagee is bound to pay ground-rent

330

*—S. 95—Charge on the property for expenses incurred in redemption by one co-mortgagor—Interest on the expenses are not allowable without notice to comortgagors about interest

484

—S. 106—Monthly tenancy—Notice to quit on last day of month is valid

167

*—S. 107—Execution of rent rate by tenant—Possession not

T. P. Act

given to tenant—No transfer of property is effected thereby

512

—S. 108 (J)—Assignment by lessee—Personal liability continues

330

—Ss. 123 and 126—Deed duly executed—Donor cannot revoke before registration: *A. I. R. 1924 Bom. 434, 48 Bom. 435 Overruled*

F B 210

W**Wagering Contract**

—See CONTRACT ACT, S. 30.

Will

—Construction—Grant excluding course of inheritance is void

—Estate in perpetuity cannot be created—Right of residence in family house is personal right

473

—Construction—Previous clause giving property as 'gift'—Subsequent clause directing disposal after the donee's death—Legatee was held to take life interest

292

—Construction—Priority of legacies—Statement that a particular legacy should be given first and then another—Intention to give priority cannot necessarily be presumed

337

Withdrawal of Suit

—See CIVIL P. C., O. 23, R. 1.

Words

—Maleki does not necessarily mean ownership

THE ALL INDIA REPORTER 1925

BOMBAY HIGH COURT

★ ★ 1925 BOMBAY 1

Full Bench

SHAH, AG. C. J., KAJIJI AND
KINCAID, JJ.

An Attorney—In re.

Disciplinary Jurisdiction, Decided
on 11th August 1924.

(a) *Legal Practitioner—Professional misconduct—Courts' discretion is to prevail as to hearing private party when proceedings have been taken by the Advocate-General.*

It must depend upon the discretion of the Court having regard to the circumstances of the case to decide whether a private party may be heard or not after proceedings have been taken by the Adv. General against a legal practitioner for professional misconduct.

[P 1 C 2; P 2 C 1]

(b) *Legal Practitioner—Proceedings against—Rule should be brought on for hearing as quickly as possible.*

In proceedings which affect an officer of the Court personally it is necessary that the rule should be brought on for hearing as quickly as possible.

[P 2 C 2]

★ (c) *Legal Practitioner—Proceedings against—Rule should be served on the representative body of the legal profession to enable them to press the view of the profession.*

Where the Advocate General has not moved the Court at the instance of the representative body of the profession the rule should be served upon that body also in order that they may have an opportunity of representing to the Court the point of view of the profession.

[P 2 C 2]

(d) *Legal Practitioner—Mode of defence should not give rise to adverse presumption against practitioner.*

Court should not treat anything in the conduct of the case by the practitioner against whom proceedings are taken as indicating a lack of confidence in his own defence on the merits.

[P 2 C 1]

★ ★ (e) *Evidence Act, S. 126.*

Giving out matter which is already a disclosed fact is not forbidden.

[P 4 C 1]

★ ★ (f) *Evidence Act, S. 126—Legal practitioner engaged by two parties in the same matter.*

Where a legal practitioner is engaged by two parties he can not make any disclosures in proceedings between a third party and one of his clients without consent of both of his clients though as between them there can be no secrecy. 3 Bom. 212 A. & E. 171 Foll.

[P 6 C 2]

(g) *Evidence Act, S. 126—Friend of party.*

1925 B/1 & 2

Presence of the client's friend when professional communications are made to an attorney does not affect attorney's obligation to keep the communications secret. [P 7 C 2]

★ (h) *Evidence Act, S. 126—Disclosure of advice given by a other person is also forbidden.*

S. 126 prohibits disclosure not only of any advice given by the professional adviser in the course and for the purpose of his employment but also the disclosure by an attorney of advice given by another person such as a barrister, attorney etc.

[P 8 C 1]

★ (i) *Evidence Act, S. 126—Privilege.*

The obligation continues after the employment has ceased.

[P 8 C 1]

(j) *Evidence Act, S. 126—Absence of litigation or of prospect thereof at the time the confidential communications are made is no excuse for disclosure.*

The obligation to keep undisclosed matters which ought not to be disclosed has nothing to do with the question whether at the time when the communications were made there was pending litigation or any prospect of it. L. R. 8 Ch. 361 Foll.

[P 8 C 1]

B J. Desai—for Attorney.

Shah, Ag. C. J.—In this case a rule nisi was issued against an attorney of this Court at the instance of the Advocate General to show cause why he should not be dealt with under clause 10 of the Amended Letters Patent for his alleged professional misconduct.

[His Lordships after referring to some preliminary matters proceeded:—]

After hearing the parties on the rule obtained by the Advocate General, we heard Mr. Bahadurji for Bai Javerbai in support of the original rule. Though in this case we have heard Mr. Bahadurji, I do not desire to be understood as holding that he was entitled to be heard. It is not desirable to lay down any general rule as to the necessity of hearing a private party after the proceedings have been taken by the Advocate General in a matter of this kind. It must depend upon the discretion of the Court, having regard to the circumstances of the case, to decide whether a private party may be heard or not.

At the outset, I desire to observe that there has been undue delay in bringing on this rule for hearing. In proceedings of this nature, which affect an officer of this Court personally, it is necessary that the rule should be brought on for hearing as quickly as possible. Generally speaking, as regards the procedure to be observed in such cases, I may add that I respectfully agree with the observations of Jenkins, C. J. at the close of his judgment in *In re an attorney* (1). I only desire to add that where the Advocate General has not moved the Court at the instance of the Incorporated Law Society, the rule should be served upon the Society also in order that they may have an opportunity of representing to the Court, if so advised, the point of view of the profession. In dealing with the case on the merits, as pointed out by the learned Chief Justice in the above case, "though many objections of a somewhat technical character have been placed in the forefront of the attorney's answer (to the application of the learned Advocate General), it would be neither safe nor just to make against the attorney himself any adverse presumption, on this account, or to treat the conduct of the case as indicating a lack of confidence in his own defence on the merits." I have not overlooked the observations at P. 128 of the report in the said case as to the nature of the proof required in considering the case against the attorney.

It is necessary to state a few facts to understand the grounds of the complaint against the attorney. Bai Javerbai's [Bai Javerbai was the party who started the proceedings in the first instance] husband Keshavji died in 1901, leaving a large estate. He left no issue. He had business firms in Cutch, Bombay and Zanzibar. The firms were carried on in the name of Damodar Jairam or Keshavji Damodar. Keshavji left a sister named Hirabai. She was married to one Chaturbhuj, and had two sons Manubhai alias Chhabildas and Baburao. Manubhai had an infant son Snehkant in the year 1919.

Chaturbhuj had a brother named Jairam. At Zanzibar the firm of Damodar Jairam had incurred heavy losses, when that firm was looked after by Javerbai's brother. In 1918 Javerbai apparently wanted to raise a loan on the mortgage of some of the properties, and on the occasion the attorney acted both for the mortgagor and the mortgagee. At that time apparently counsel's opinion was taken as to the liability of the estate of Javerbai's husband for certain debts which were incurred in Zanzibar by the firm of Damodar Jairam. A part of the complaint against the attorney relates to certain evidence which he gave in 1923, to which I shall refer later in connection with this mortgage transaction. At this time apparently Gordhandas, who was the Munim of Javerbai in Bombay, and Jairam, the brother of Chaturbhuj, husband of Hirabai, attended on behalf of Javerbai in connection with the mortgage.

About October 1, 1919, apparently Javerbai called her legal adviser named Revashankar from Cutch to Bombay; and on that day, *i. e.*, October 1, both Revashankar and Jairam (brother of Chaturbhuj) went to the attorney to take advice as to the adoption which Javerbai is said to have intended to make. Apparently at the time a document which was not signed, but which is said to have been a draft of the will made by the deceased husband of Javerbai, was shown to the attorney, and the question appears to have been whether Baburao, the son of the sister of Javerbai's husband, or her grandson, *i. e.*, Manubhai's infant son Snehkant, would be eligible for adoption. There were also some questions connected with the debts due by the firm at Zanzibar. At the request of Revashanker and Jairam, the attorney held a consultation with counsel, and thereafter, he prepared a draft agreement. As a result of some further consultations with counsel ultimately the final agreement, which is Ex. 9 in the case, with regard to this adoption was drawn up on October 13. This document was attested by the attorney. Thereafter the infant boy Snehkant,

(1) [1913] 41 Cal. 113=19 I. C. 993=14 Cr. L. J. 305.

the son of Manubhai *alias* Chhabildas, was adopted and the adoption deed was executed on November 13, 1919. Manubhai was appointed the legal guardian of the adopted boy Snehkant in March 1920.

A suit was filed by the Standard Bank of South Africa against the firm of Damodar Jairam, the minor Snehkant, who was named Haridas in his adoptive family, represented by his natural father Manubhai, and Hicabai, in H. B. M's Court for Zanzibar. In that suit the standard Bank of South Africa claimed the sum of Rs. 6,00,000 and odd on certain securities, and a declaration that the adoption of defendant No. 2 was invalid, that it ought to be set aside, and that in any event the claim made by them was good and valid as against the assets of the deceased Keshavji Damodar Jairam. In connection with the adoption the case made by the Bank in the plaint was that it was not the result of free will of the widow, but was brought about by coercion, false representation and undue influence of the third defendant, the grandmother, Manubhai Chaturbhuj, the natural father and Jairam Vasanji, the granduncle of the adopted boy, and without independent advice. In connection with this a commission was issued by the Zanzibar Court to this Court. In the commission matter the same attorney was engaged by Manubhai, the guardian of the minor boy, who was defendant No. 2 in the case, in September 1921. Later on in October 1922, Javerbai filed a suit No. 4742 of 1922, on the Original Side of this Court against Snehkant, the son of Manubhai. The allegations with regard to this adoption are set forth in paragraphs 7 and 8 of the plaint, and among the several reliefs claimed by her, the most important was a declaration that the adoption of the second defendant was invalid in law and not binding on the plaintiff. The same attorney was engaged in this suit on behalf of the adopted boy against Javerbai. It may be mentioned that the case for the attorney, as now made, is that he ceased to act for Javerbai after the adoption, while according to Javerbai he continued to act for her with reference

to other matters up to March 1922. According to her, when she found that her interests were not looked after by the attorney, she engaged other solicitors.

This was the state of affairs when in May 1923, the Prothonotary of this Court, as Commissioner in the Zanzibar suit, recorded the evidence of the attorney. Mr Ferreira, who was the solicitor for Bai Javerbai, was present, but he did not appear before the Commissioner on behalf of any party. Defendants Nos. 1 and 3 in the Zanzibar suit were not present; but the plaintiffs and defendant No. 2 were represented. Before the Prothonotary, the attorney was examined on May 14 and 15, 1923. In the course of his examination and cross-examination the attorney produced certain papers connected with the adoption deed showing the consultations with counsel, and the drafts of the proposed agreement for adoption which ultimately resulted in the final agreement in relation to this adoption on October 13. He also made certain statements connected with these documents and the consultations and instructions that he had from and on behalf of Javerbai in connection with this adoption. He also made certain statements with regard to the mortgage transaction of 1918. These several statements, in respect of which Javerbai alleged improper disclosure on the part of the attorney, are indicated and separately numbered. But briefly stated, the complaint against the attorney is that in contravention of the provisions of S. 126 of the Indian Evidence Act, he disclosed without the consent of Javerbai communications made to him in the course and for the purpose of his employment as such attorney by or on behalf of Javerbai, and stated the contents or conditions of documents with which he became acquainted in the course and for the purpose of his professional employment on her behalf.

I shall first deal with the case made against the attorney as regards the disclosure of matters in connection with the mortgage transaction. The statements are marked 11A and 11B in the evidence of the attorney

It may be at once stated that no privilege is claimed with reference to the mortgage deed, and no privilege can be claimed with respect to it. That document is attested by the attorney and is registered. Besides he has not stated anything with reference to this transaction which is not contained by way of recital in the document. The point made against the attorney is that he stated that counsel had given a certain opinion with regard to the debts incurred by the firm of Damodar Jairam in 1916 and thereafter. It appears, however, from the affidavits in the case and the letter dated June 10, 1919, which has been put in, that this opinion was already communicated to the firm at Zanzibar by Chaturbhuj. After a consideration of the arguments on both sides on this question, I have come to the conclusion that the attorney has not stated anything which can be said to contravene the provisions of S. 126. As regards the opinion of counsel, which he had obtained in the course of his employment as an attorney for Javerbai and which could not be disclosed by him without the consent of his client, it appears that long before he gave evidence the opinion was already a disclosed fact. There was no dispute between Javerbai and Manubhai at the time; and the attorney must be deemed to have acted then with the consent of Javerbai. I am not prepared to hold that in making the statement that the attorney has made with reference to this transaction he has contravened the provisions of S. 126.

The Principal ground of the present application is in relation to the statements made by the attorney as regards the adoption of Snehkant. It is clear from the evidence of the attorney in 1923 that though he knew already that there was a dispute as to this adoption between Javerbai and the adopted son, he gave evidence disclosing facts which came to his knowledge in the course of his employment as an attorney in connection with this adoption. He disclosed what happened from October 1st to October 13, 1919, and stated all he knew about the docu-

ments relating to his consultations with counsel, his draft of the agreement, the settlement of that draft and the final agreement which was drawn up for approval on October 9. At that stage apparently on the suggestion of counsel it was considered desirable to have this draft approved independently on behalf of the minor boy and with that view Messrs. Payne & Co. were engaged by Manubhai, who was then the natural guardian of the boy to be adopted. That agreement was approved of by Messrs. Payne & Co. with certain alterations, and ultimately the agreement was executed on October 13. It is quite clear that so far as this document, dated October 13, is concerned, there is no privilege attaching to it. It is claimed by the learned Advocate General that the attorney acted, very improperly and contrary to the provisions of S. 126 of the Indian Evidence Act in disclosing all the matters connected with the adoption and with the various documents which are put in Exs. 2 to 7). It is not necessary to refer to the various statements which relate to this part of the case in detail. They are marked Nos. 1 to 19 in the evidence of the attorney, and if we exclude the statements which relate to the mortgage transaction of 1918, all the rest really relate to the disclosures said to have been made with reference to the adoption. It is quite clear, and it is not disputed, that if the attorney was acting for Javerbai alone, such disclosures would be contrary to the provisions of S. 126 of the Indian Evidence Act, and that position appears to me to be beyond question.

It is urged, however, by way of reply on behalf of the attorney that he was not engaged only on behalf of Javerbai on October 1, but acted both for Javerbai and for the boy to be adopted, as represented by Manubhai, the natural father of Snehkant, and the brother of Baburao. It is urged that as he was engaged on behalf of both parties, and as the statements were made in the presence not only of Javerbai's agent Revashankar, but in the presence of Manubhai and Jairam, and were known to both parties, it was open to the attorney to state

what he has in fact stated in his evidence as to what transpired in relation to this agreement between him and counsel, also between him and Javerbai and between him and Javerbai's agent Revashankar and Jairam who apparently attended to this matter. It is pointed out that Manubhai was present at some of the interviews, and from the beginning the engagement was on behalf of both Javerbai and the boy to be adopted. It is also urged that if the Court is not satisfied that the attorney was engaged on behalf of both sides, still as Jairam and Manubhai are shown to have been present at these interviews and to have known what was passing between the attorney and Javerbai, there was no communication of a confidential and private nature within the meaning of S. 126 which could not be disclosed.

It is also urged that these documents were in fact handed over by the attorney to Manubhai as the guardian of the adopted boy, and that in fact those documents were produced by the attorney in the course of his evidence as they were returned to him in connection with this commission matter by Manubhai. It is urged that the documents having been thus transferred by him to the other side, there can be no privilege about these documents, and that the opinion of counsel connected with these documents could be properly disclosed by him.

Before dealing with these contentions, it is necessary to decide for the purposes of this application, on the evidence such as it is, certain facts which are in dispute. As regards the alleged presence of Manubhai at the time of the engagement of the attorney, and the subsequent consultations with the attorney from October 1 to October 9, it may be mentioned that the attorney himself does not refer to the presence of Manubhai in his evidence before the Prothonotary. In the beginning of his evidence he has stated that at the time he was engaged on October 1, Revashankar and Jairam went to him. He does not mention Manubhai, and further on in cross-examination when he was asked, he said that he might have seen Manubhai in his office, but could not

swear that he did not. With reference to this statement it is urged by the learned counsel for the attorney that that cannot refer to the period with which we are concerned. I am not sure that it does not. But I am willing to allow that the statement is not clear on this point. Taking the evidence of the attorney before the Prothonotary as a whole, it is fairly clear that though he has mentioned that Revashankar and Jairam attended his office and gave instructions to him and consulted him in connection with this adoption on behalf of Javerbai he does not mention the name of Manubhai anywhere in his evidence. No doubt when the present proceedings were initiated he stated that Manubhai was present. But in view of the attorney's own evidence before the Prothonotary I am not satisfied beyond reasonable doubt that Manubhai was present when the attorney was engaged and consulted in connection with this adoption by Revashankar and Jairam.

The second question of fact is whether the engagement must be taken to have been on behalf of Javerbai alone or on behalf of both Javerbai and the boy to be adopted. On this point unfortunately, the contemporaneous documents do not throw any light, except Ex. 2, from which it would appear that he was acting as the attorney for Javerbai. The docket (Ex. 2) shows that Javerbai was the querist and he had signed it as the querist's attorney. In the other document there is nothing to show one way or the other whether at that time he was acting for both. The letter which the attorney wrote to Messrs. Payne & Co. on October 9 does not suggest that the engagement was for both. The letter is in these terms:—

"We beg to send you herewith fair draft agreement for adoption. We are informed that you represent the natural father and mother of the minor proposed to be taken in adoption by our client, Bai Javerbai, widow of Keshavji Damodar, and we are therefore instructed to send the draft agreement for your approval on behalf of your said clients."

That letter rather suggests that the engagement was on behalf of Javerbai. The fact that Revashankar and Jairam were present does not go to show that there was any joint engage-

ment. At the same time I recognise that as soon as a point was made by Javerbai that he was improperly disclosing matters of a confidential and private nature contrary to the provisions of S. 126, the attorney wrote on May 21, 1923, to Messrs. Ferreira and Vallabhdas that he acted also for the minor until he went to Messrs. Payne & Co. on being advised so to do by the counsel consulted by him, and he has adhered to that position in his reply affidavits. On these materials I cannot say that I am quite satisfied that the engagement was on behalf of both, though I am willing to deal with the case on that footing.

The other question of fact, about which there has been argument before us, is whether the documents were in fact handed over by the attorney to Manubhai or not. On this point also unfortunately the contemporaneous documents, which would throw any light on the question, are not forthcoming. There is no diary, and no copy of the bill of costs can be found. In the course of the argument it is shown that the amount of the bill of costs was paid by Javerbai in May 1920; and it is said on behalf of the attorney that about this time the documents were handed over to the guardian of the adopted son. Unfortunately there is no record of it, and there is no indication in the affidavits as to when the documents were given over. We are asked to presume that they must have been given about the time when the money was paid.

As against these considerations, there are the statements in the affidavits of the attorney and Manubhai and Jairam that the documents were so handed over to Manubhai. Here again though the conflicting considerations do not leave the matter in a satisfactory and assuring condition, I am prepared to accept the position that the attorney gave the documents for some time, we do not know when and how long, to Manubhai. But the fact remains that they were produced by him at the time when he gave his evidence. Though much stress was laid upon the circumstances that the documents were parted with, and therefore, could not

be privileged, I do not think that in the result it matters whether the documents were thus handed over in fact by the attorney to Manubhai or not.

I shall now deal with the question of attorney's conduct on the facts as they appear. It is an undoubted fact that he was engaged on behalf of Javerbai. It is not clear as to whether he was engaged on behalf of the boy to be adopted at the time. But assuming that there was joint engagement on behalf of both, it was not open to him to disclose facts relating to these documents in the Zanzibar suit. That was a suit brought by a third party against the firm of Damodar Jairam and the adopted boy. Javerbai was not a party to that suit, and he was clearly giving evidence in a proceeding between a third party and one of his clients, taking his case on this point at its highest. In such a case, under S. 126 of the Indian Evidence Act, he cannot disclose any communication made to him in the course and for the purpose of his employment by or on behalf of his clients or to state the contents or conditions of the documents with which he has become acquainted in the course of his professional employment without the consent of both these clients. It may be, and it is undoubtedly the case, as pointed out in *Memon Hajee Haroon Mahomed v. Molvi Abdul Karim* (2) that as between the two parties who engage the solicitor there can be no secrecy or privilege. But it is also clear from that case that as between a third party and any one of the two parties who engaged him his lips are sealed with respect to communications made to him in the course and for the purpose of his employment as a solicitor. In the course of a clear and forceful argument Mr. Desai has attempted to show that if once it is conceded that as between the adopted boy and Javerbai there can be no secrecy with reference to these communications, the attorney was entitled to disclose them in the Zanzibar suit according to the *ratio decidendi* in *Memon Hajee Haroon Mahomed v. Molvi Abdul Karim* (2). It seems to me that the concluding observations of

(2) [1878] 3 Bom. 91.

Westropp C. J. are distinctly against his contention.

On principle the position appears to me to be fairly clear. If the engagement was on behalf of Javerbai alone it is clear that he could not disclose these matters to any other person without her consent. Similarly if the engagement was on behalf of both, whatever the position of the attorney may be with reference to these communications as between the two persons, he could not disclose these communications to any one beyond those persons without the consent of both. In *Doe dem Strade v. Seaton* (3) it has been pointed out by Taunton, J., that in that case Palmer, who held the draft, was the joint agent of both vendor and vendee with respect to it. He could not produce it without the consent of both. In the same case Patteson, J., observes as follows (p 180):—

"No, if an attorney keeps a draft, he must keep it according to the nature of his original employment, and subject to the rights of both the parties (if two) by whom he was employed. One or the other of them has a right to say that he shall not produce it."

That seems to me to be the view taken by Sir Michael Westropp, C. J., in the case to which I have referred. On the basis of the joint engagement, as to which, I repeat, I am not satisfied beyond reasonable doubt, the position of the attorney in making these disclosures cannot be justified.

It is further argued that even if there was no joint engagement on behalf of both parties, at least Jairam, who was the grand-uncle of the adopted boy, was present, and he is not shown to be the agent of Javerbai. It is urged on the strength of the observations in the same case to which I have referred, that there can be no privilege or secrecy as Jairam would himself be a competent witness to depose to these communications. I may say at once that Jairam's presence has been deposed to by the attorney from the beginning, and I do not feel any doubt that both Revashankar and Jairam went to the attorney on October 1. But Jairam, as I have pointed out, used to attend with Gordhandas in con-

nection with the mortgage transaction, and apparently in October 1919 when Jairam went with Revashankar, it is not at all clear that he went on behalf of the adopted boy. It cannot be assumed, and I see nothing in the circumstances of the case to justify the contention, that he went to the attorney not as the agent or friend of Javerbai, but on behalf of the adopted boy as distinguished from Javerbai. It seems to me that both he and Revashankar went to the attorney really on behalf of Javerbai, and Jairam's presence in this matter with reference to the communications was not the presence of a stranger or that of the other party, but the presence of a friend and practically of the agent of Javerbai. When the real nature of Jairam's relation with Javerbai in connection with this matter is realised, it is not difficult to hold that that cannot affect the obligation of the attorney not to disclose the communications made to him in the course and for the purpose of his employment. Mr. Desai has very strongly relied upon the observations in *Memon Hajee Haroon Mahomed's case* (2), and he has contended that as in that case the other side was present and the communication ceased to be secret or privileged for the purposes of S. 126 similarly here Jairam's presence puts an end to the obligation to keep any secrecy about the communications. I am unable to accept this contention. The observations of the learned Chief Justice there refer to the presence of the opposite party as such and the presence of a friend on the same side cannot possibly be treated as relieving an attorney from the obligation to keep undisclosed communications which were made to him in the course and for the purpose of his employment, nor was he at liberty to disclose the contents or the conditions of the documents.

It has been urged that the evidence given by the attorney is purely formal, and if the documents are otherwise available to the adopted boy, there can be no contravention of S. 126 in giving the evidence which the attorney has given. I am unable to accept this contention. The section prohibits any

(3) [1831] 2 A. & E. 171.

atement being made with regard to the contents or conditions of the documents, and taking the statements made by the attorney as a whole, it is not reasonably possible to hold that his evidence is purely formal. His statements about the condition of the documents—and I am here referring only to the documents other than the final agreement and the deed of adoption—and his statement containing communications made during the course and for the purpose of his employment, must be treated as being of a confidential and private nature.

It is necessary to refer to 2 points which have been made by the attorney in his affidavit dated July 26, 1924. The attorney seems to be under the impression that S. 126 of the Indian Evidence Act prohibits disclosure of any advice given by the professional adviser in the course and for the purpose of his employment, and does not apply to the disclosure by an attorney of advice given by another person such as a barrister attorney etc. It is not possible to accept this view, and the learned counsel for the attorney has not attempted to justify it. At another place in the affidavit, he suggests that as there was no litigation then pending or in contemplation, there can be no privilege with regard to these communications. The explanation to S. 126 clearly provides that the obligation continues after the employment has ceased. So whether the employment ceased on October 18, 1919, or later on somewhere in 1922 on behalf of Javerbai the obligation under S. 126 not to disclose communications within the scope of S. 126 continued. The section itself contains no such limitation as is suggested by him, and it is enough to refer to the observations of Lord Selborne in *Minet v. Morgan* (4) which clearly show that the obligation to keep undisclosed matters which ought not be disclosed, has nothing to do with the question whether at the time when the communications were made, there was any pending litigation or any prospect of it.

I refer to these points made in the affidavit of the attorney as indicating that his general outlook with refer-

ence to his obligations under S. 126 appears to me to be wrong. I am willing to assume in favour of the attorney that when he gave the evidence, he did not fully realise the scope of the prohibition under S. 126 but I cannot appreciate or understand his attitude in maintaining on such grounds as I have already indicated, he was justified in doing what he did.

I am satisfied on a consideration of all the arguments and the materials placed before us that the attorney has disclosed matters in the Zanzibar suit contrary to the provisions of S. 126. The attorney was fully aware of the conflict of interest between Javerbai and the adopted boy in 1923. When he gave evidence in the Zanzibar suit he had good reason to advert with due care and attention to the question of his obligation to Javerbai under S. 126. There is nothing in his affidavits to show whether he made any real effort to enlighten himself and whether after proper attention to the point he came honestly, though mistakenly, to the conclusion that he could act as he did. The affidavits disclose more a desire for special pleading to justify the position taken up by him than a desire to regard the rights of others, such as may be expected in an *equo re cognoscendo* of his standing. Such transgression of S. 126 is a serious matter and cannot be lightly passed over.

It is rather unfortunate that these proceedings have arisen while the two suits are pending. I desire to make it clear that we express no opinion as to any points that may arise either in the Zanzibar suit or in Javerbai's suit in this Court. The evidence has not been tested by cross-examination of witnesses, and our conclusions in these proceedings must be taken to be limited by the scope of this inquiry.

We hold that the attorney has been guilty of professional misconduct.

We order him to be suspended from practice for three months, and direct him to pay the costs of the rule on the Advocate General's application, and the costs of the rule on Javerbai's application up to and inclusive of the hearing before Mr. Justice Kemp. I We make no order as to further costs on that rule.

Rule made absolute.

(4) [1873] 8 Ch. 361=42 L. J. Ch. 627=28 L. T. 573=21 W. R. 467.

★ ★ 1925 BOMBAY 9

SHAH AG. C. J., AND FAWCETT, J.

Hanamgowda Shidgowda Patil—Appellant.*Irgowda Shivgowda Patil*—Respondent.

F. A. No. 269 of 1922, Decided on 25th June 1924, from the decision of the First Class Subordinate Judge at Belgaum in Suit No. 458 of 1920.

★ (a) *Hindu Law — Reversioner—May enforce right without setting aside widow's alienation—Limitation Act, Art 91.*

In the case of a reversioner it is not essential for him to set aside any alienation by the widow, but he can sue to enforce his right as reversioner without setting aside the alienation within the period prescribed by the Limitation Act after the death of the widow. 33 C. 257; 31 Bom. 1; and 31 C. 339 Foll. [P 11 C 1]

★ (b) *Hindu Law—Alienation by widow—The position of adopted son and that of reversioner in regard to alienation by widow are the same but for the fact that the former's rights commence on adoption and the latter's after widow's death.*

The case of an adopted son stands on a different footing from that of a reversioner in this sense that the rights of the adopted son come into existence as soon as he is adopted by the widow and the rights of the widow as the heir of her husband come to an end on adoption while in the case of a reversioner his rights come into existence on the death of the widow. Subject to that important difference there is no essential difference in the position of the adopted son seeking to enforce his rights with reference to the property alienated by the widow before the adoption and the reversioner seeking to enforce his rights with regard to property alienated by the widow before her death. [P 11 C 1]

★ ★ (c) *Hindu Law—Adoption by widow—Alienation by widow prior to adoption—Limitation Act, Art 91.*

Adopted son may enforce his right to property alienated by widow (adoptive mother) prior to adoption, without setting aside the transfer. [P 11 C 2]

★ (d) *Limitation Act, Art 144—Overt act necessary to make possession of equity of redemption adverse—Paying mortgage debt and taking possession of mortgaged property may be such act.*

Possession by a man of the equity of redemption while the property is in the actual possession of the mortgagee should be deemed to become adverse when he signifies his assertion of his rights by an overt act. Paying off mortgagee and taking possession of the mortgage lands was held to be such overt act. [P 12 C 2]

H. C. Coyajee with Nilkant Atmaram—for Appellant.

G. N. Thakor with H. B. Gumaste—for Respondent.

Shah, Ag. C. J.—The facts necessary to understand the points arising in this appeal may be briefly stated. One Shidgowda died in 1894-95 leaving a widow Nilava. On May 22, 1900, she mortgaged the two raytava lands which are now in suit with possession to one Shankar Vishnu Gadgil for Rs. 1,200. The consideration was made up of certain debts of her husband to be satisfied and Rs. 528-5-0 taken in cash by Nilava at the time for her maintenance, and for the satisfaction of miscellaneous debts incurred by her and her husband. Six months after that, i. e., in November 1900, Nilava sold the property in suit to the present defendant for Rs. 1,500, Rs. 1,200 out of which were in respect of the mortgage just referred to, and Rs. 300 were stated to have been taken in cash to meet the expenses of household affairs in those days of famine and to pay off other debts. The defendant was the son-in-law of Nilava. In November 1907 the plaintiff was adopted by Nilava and Nilava died in December 1907. On March 25, 1908, defendant paid off the mortgage of May 22, 1900, and obtained possession of the property. It is found that Rs. 1,100 were paid in fact to satisfy that mortgage.

On December 22, 1919, the plaintiff filed a suit in the Athni Court for setting aside the sale-deed passed by Nilava in favour of the defendant, and to recover possession of the plaintiff lands with mesne profits but it was found that that Court had no jurisdiction to entertain the suit with the result that the plaint was returned for presentation to the proper Court. The suit was then filed on November 17, 1920, in the Court of the First Class Subordinate Judge at Belgaum. The defendant pleaded that both these alienations, one by way of mortgage and the other by way of sale, were for legal necessity, and that in any case the plaintiff's claim was time-barred.

The learned trial Judge examined the evidence relating to the alleged necessity for these alienations, and he came to the conclusion that the sale to the defendant was not proved to be for legal necessity. He was not satisfied that Rs. 300, said to have

been paid in cash, were in fact paid. But he held that the transaction was not a nominal and colourable transaction, and he also held it proved that the defendant had actually paid in March 1908, Rs. 1,100 to the mortgagee for the satisfaction of the mortgage of May 22, 1900. The learned Judge, however, came to the conclusion that the plaintiff's claim was time-barred. He held it to be time-barred on the ground that it was essential for the plaintiff to set aside the sale-deed in favour of the defendant, and that Article 91 of the Indian Limitation Act, Sch. I, would apply to such a claim. He found, however, as a fact that the defendant obtained possession of the property in March 1908. He also found that the time taken up by the plaintiff in prosecuting his remedy in the Athni Court should be excluded, and he expressed the opinion that if Article 91 were not applicable, the plaintiff's claim would be in time as being within twelve years from the date when the defendant's possession became adverse to the plaintiff deducting the time occupied in the Athni Court. In the result, though he found that the defendant had paid off the mortgage and that the plaintiff was otherwise entitled to the relief subject to the payment of Rs. 1,100, he dismissed the plaintiff's suit on the ground of limitation.

In appeal it has been urged on behalf of the appellant that the lower Court is not right in its view that Article 91 is applicable to this case, and that it is essential for the plaintiff before he can get this relief to set aside the sale in favour of the defendant. It is urged that it is open to him to claim possession of the property without setting aside the sale, treating the sale as not being operative against him. It is also contended that if that view is accepted, the conclusion of the lower Court is right that otherwise a claim is in time. On behalf of the respondent it is contended that the right of the adopted son came into existence on the date of the adoption, and it was necessary for him to sue the defendant within twelve years from that date, as he must be treated immediately on adop-

tion to be in adverse possession of the equity of redemption against him. It is urged that the lower Court's view that the adverse possession commenced really when the defendant got possession from the mortgagee on March 25, 1908, is not correct, and that the period of limitation really commenced to run against the plaintiff from the date of the adoption. If that view is accepted the plaintiff's claim having been brought more than twelve years after that date, (even excluding the time occupied in the Athni Court), it is barred. It is not seriously contended on his behalf that Article 91 would apply. Further it is urged that the lower Court's finding as to the receipt of cash consideration of Rs. 300 is not right.

As regards this question of fact, in spite of the argument of the respondent to the contrary, we are satisfied that the view taken by the lower Court is right, and it is not satisfactorily proved in the case that there was any necessity to execute this sale-deed at the time. The mortgage was effected only a few months before, and there could have been no pressure because there was a condition in the mortgage that the money was to be paid in two years. The evidence as to the payment of Rs. 300 has been properly appreciated by the learned Judge; and no good reason is shown for holding that the view taken by the lower Court on this point is not right.

We, therefore, accept the facts found by the lower Court. The sale-deed remained practically a paper transaction from 1900 up to the time the defendant paid off the mortgage in March 1908 and obtained possession from the mortgagee. It has been pointed out to us that in the revenue year 1907-08 an entry was made in the Record of Rights that there was a sale in favour of the defendant. That, however, does not alter the position, that so far as the outward appearances went, beyond taking the document in 1900 the defendant who was the son-in-law of Nilava did nothing to show that he was asserting his right under the sale-deed. The first tangible act on his part, of which we have evidence

on this record, is the payment made by him to the mortgagee in March 1908, and the recovery of possession of the lands from the mortgagee at that time.

The first point to be considered is whether the lower Court's view that it was essential for the plaintiff to set aside the sale under Article 91 is correct. We are of opinion that the view of the lower Court is not right, and is not supported by any authority. So far as we can see it is opposed to the decisions of this Court to which we shall presently refer. It may be taken as established, and there is ample authority for the proposition, that in the case of a reversioner it is not essential for him to set aside any alienation by the widow but that he could sue to enforce his right as a reversioner without setting aside the alienation within the period prescribed by the Indian Limitation Act after the death of the widow. The position is supported by the decision in *Harihar Ojha v. Dasarathi Misra* (1), *Rakhmabai v. Keshav* (2) and *Bijoy Gopal Mukerji v. Krishna Mahishi Debi* (3). That is not in dispute. But the learned Judge apparently is of opinion that the case of a reversioner stands on a different footing from that of an adopted son. It is true that the case of an adopted son, with which we are concerned now, stands on a different footing in this sense that the rights of the adopted son come into existence as soon as he is adopted by the widow, and the rights of the widow as the heir of her husband come to an end on adoption, while in the case of a reversioner his rights come into existence on the death of the widow. Subject to that important difference, there is no essential difference in the position of the adopted son seeking to enforce his rights with reference to the property alienated by the widow before the adoption and the reversioner seeking to enforce his rights with regard to

property alienated by the widow before her death. The decisions of this Court in *Moro Narayan Joshi v. Balaji Raghunath* (4) and *Ramakrishna v. Tripurabai* (5) make this position clear. Though these decisions do not directly deal with the question as to whether it is essential for the adopted son to set aside a deed or not, it seems to us that it is necessarily involved in the decision in *Moro Narayan Joshi v. Balaji Raghunath* (4) where it was held that to a suit by the adopted son Article 140 or 144 would apply. The leaning of the Court was distinctly in favour of applying Article 144 to a suit by the adopted son. But it was not suggested in that case that Article 91 would apply, and though on the facts of that case it may be said that it made no difference whether Article 91 would apply or Article 144 or 140 would apply, it seems to us to be a fair inference from the judgments in that case that Article 91 would have no application. Besides there is no reason why the adopted son should be required to set aside the deed any more than a reversioner. It is clear, therefore, that the view taken by the lower Court as to the application of Article 91 and as to necessity on the part of the adopted son to set aside the sale is not right.

The real answer which the respondent has attempted to offer in support of the decree of the lower Court on the question of limitation is not that it is essential for the adopted son to set aside the sale, but that in fact the suit has not been brought within twelve years from the date on which his rights accrued. His rights accrued in November 1907, and the suit in the Athni Court was filed in December 1919. It is urged that the claim is beyond time on that ground, as ever since the date of the sale deed the equity of redemption was vested in the defendant, and he was in possession and enjoyment of the equity of redemption as from that date. The rights of the adopted son accrued on his adoption, and applying Article 144 to his claim we have to consider whe-

(1) [1905] 33 Cal. 257-9 O.W.N. 636-1 C.L.J. 408.

(2) [1906] 31 Bom. 1-8 Bom. L.R. 675.

(3) [1907] 31 Cal. 29-34 I.A. 87-11 O.W.N. 424-5 C.L.J. 334-9 Bom. L.R. 602-2 M.L.T. 133-17 M.L.J. 154-4 A.L.J. 329 (P.O.)

(4) [1894] 19 Bom. 809.

(5) [1908] 33 Bom. 88-10 Bom.L.R. 1029.

ther his present claim is in time. In substance this is a suit for possession of immoveable property, and by way of reply it is urged that the defendant has been in adverse possession of the equity of redemption for over twelve years. It is always a difficult thing to determine as to when the adverse enjoyment of the right of the equity of redemption commences when the actual possession of the property is with the mortgagee as in the present case. In a case of this kind, unless we have some clear indication in the shape of an overt act on the part of the alienee to indicate that he was asserting his rights under the sale deed, it is difficult to say that he was in possession of that right. Taking the situation as it was in November 1907 when the plaintiff was adopted, it appears that shortly after that the widow died; and we find that the defendant paid off the mortgage and took possession of the mortgage lands in March 1908. That was the first overt act, so far as this record can show, on the part of the defendant, when he really came into possession of his rights under the sale deed. As against this, it is urged that at least as regards the equity of redemption, he must be taken to have been in adverse possession since November 1907. The interval is very short and, as we have said, there was no clear indication by any overt act on the part of the defendant that at that date he was actually in possession of this intangible right against the adopted son. The first indication that we have after the adoption of any assertion on the part of the defendant of his right to this property is when he took possession of the property in March 1908. In the circumstances, of this case, it seems to us that the lower Court was right in its conclusion that the adverse possession of the defendant really commenced in March 1908 when he took possession of the mortgaged property. This conclusion appears to work out a just result namely that the defendant who has paid the mortgage amount to the mortgagee will be able to recover his mortgage amount and the property will go to the rightful owner, the adopted son.

We, therefore, reverse the decree of the lower Court and pass a decree in favour of the plaintiff, directing that he should pay Rs. 1,100 to the defendant within six months, and on his paying that sum the defendant should hand over possession of the properties in suit free from all incumbrances. The plaintiff to pay half the costs of the defendant in the lower Court, and to get the costs of the appeal here from the defendants. If such payment is not made in six months, the plaintiff shall be debarred from all right to possession of the property on the decree being made final.

Appeal allowed.

Decree reversed.

1925 BOMBAY 12

SHAH, AG. C. J. AND FAWCETT, J.

Secretary of State—Appellant.

v.

Shantaram Narayan Dabholkar — Respondent.

O. C. J. Appeal No. 45 of 1923, Decided on 8th July 1924.

* (a) *Inam—Question as to grant being of soil or of share of revenue is one of fact in each case—Presumption that grant passes only share in revenue does not exist.*

There is no presumption in the case of an inam that in the absence of proof it must be taken to be a grant of the royal share of the revenue and not of the soil. It is a question to be determined on the evidence in each case as to whether it is a grant of the soil or of the royal share of the revenue. [P. 14 C. 1, 2]

(b) *Inam—Right to mines*

Express words in the grant are not necessary for the transfer of the right to mines and minerals in the lands granted. [P. 15 C. 1]

(c) *Inam—Construction—Grant should be construed strictly in favour of Government.*

Inam grant should be construed strictly in favour of the crown though in ordinary cases the construction should be in favour of grantee. [P. 18 C. 1]

(d) *Deed—Construction—Question is not so much of parties' intention as of meaning of words used.*

In construing the terms of a deed the question is not so much what the parties may have intended as what is the meaning of the words which they use. [P. 18 C. 1]

* (e) *Precedent* — Old authorities deserve special importance as many rights may have been founded thereon.

Great importance is to be attached to authorities on the strength of which many transactions may have been adjusted and rights determined. (1908) A. C. I. Foll. [P. 18, C. 1]

Kanga with Coltman — for Appellant.

Campbell with Dalvi — for Respondent.

Shah, Ag. C. J.—This appeal arises out of certain references under the Land Acquisition Act. There were three references before the learned trial Judge. Apparently the Acquisition Officer had awarded compensation on the footing of the surface value of the land in question, and it was agreed before the lower Court by the parties that the Court should be asked to give a decision on one point only, namely, whether or not the claimant had a right to the stone in the Inam land. It is not clear on this record as to how this question would be decisive of the references entirely. But it has been stated to us in the course of the argument that this particular right does not require to be valued, as the parties are agreed that one party or the other in whose favour the Court will give its decision on the point will be entitled to remove the stones, and that nothing further would remain to be decided. That was the only question which the Court was called upon to decide. The decision of the question depends upon the construction of the grant of this land. The grant is evidenced by Exhs. A and B. Exh. A 1 really contains a description of the lands which were intended to be the subject-matter of the grant. The grant (Exh. A 1), dated December 29, 1783, is in these terms :—

"This is to certify that Vice-Admiral Sir Edward Hughes K. B. and Commander-in-Chief of His Majesty's ships and vessel in the East Indies having by letter under date March 10, 1783, pointed out the great services rendered to the nation at large and the United East India Company by Manckjee Lowjee and Bomonjee Lowjee the two Master-Builders at this Presidency and having also strongly recommended to us to confer on them a certain portion of ground on this island, which will yield annually forty Mopras of Toka Batty, this is to certify that the said Manokjee Lowjee and Bomonjee Lowjee have accordingly been put in possession of certain Batty grounds in the District of Paral, with their for as a n

perteneas of the said grounds which will yield the above quantity of Toka Batty and that they are to be kept in possession of the same without molestation, until the pleasure of the Honourable the Court of Directors is known."

This grant was confirmed by the Court of Directors on April 28, 1795, in the following terms :—

"Observing by your advices of September 30, 1783, and February 10, 1784, that you were induced to issue the grant to the two Hughes Master-Builders and the reasons at the earnest recommendation of the late Sir Edward as a reward for the essential and important services they had rendered the nation and the company in particular in refitting His Majesty's squadron and as we ourselves have borne frequent testimony of their merits we hereby ratify and confirm the said grant with a due proportion of Foras and Perteneas to their family and descendants."

The learned trial Judge on a construction of this grant came to the conclusion that this was an absolute and complete grant of the land, and that it conveyed the right to the mines and minerals including stones to the grantees.

From this decision the Secretary of State for India in Council has appealed, and it is urged in support of the appeal, first, that the grant is not of the land at all, but of the produce in the land. It is contended that the intention was really to give to the grantees the benefit of forty Moodas of Batty every year, and that the grant must be taken to be the grant of the produce of the soil and not of the soil. Secondly, it is urged that even if it be treated as a grant of the soil, it must be construed as a grant of the surface of the soil and not of the sub-soil. It is urged that unless there are express words conveying a right to mines and minerals, that right could not be said to be conveyed by the grant.

Several cases have been cited in the course of the argument with reference to these contentions, but ultimately the decision must depend upon the terms of this grant. Though I shall have to refer to some of the cases I shall first deal with the question of construction of these documents.

As regards the first question whether this is a grant of the land or merely of the produce, it seems to me to be clear from the words used both in Exh. A, as, also in the Despatch Exh. B confirming the grant, that it

was a grant of the land, and not merely of the produce of the land. In connection with this point we have to remember that this land is situated in the city of Bombay, and that it is not subject to the limitations, to which, for instance, the occupancy holdings outside the city of Bombay would be subject under the provisions of the Bombay Land Revenue Code. The provisions of Act II of 1876 are applicable to the city of Bombay, and it is important to note that there is no kind of statutory limitation upon the use to which such land, which has been referred to in the grant, could be put.

Then there is nothing in the words of the grant to indicate that the purpose of the grant was to give only the benefit of forty Moodas of Batty to the grantees; but it seems to me that the reference to the forty Moodas of Toka Batty is really to indicate the extent of the land intended to be given: It is clear from Exh. A that different lands with different names, which in all were then calculated to yield forty Moodas of Toka Batty, were given, and the due proportion of Foras and Perteneas also was to form part of the grant. Whatever the value of the presumption in the case of Inam grants by the Crown in this Presidency outside the island of Bombay, that in the absence of proof it must be taken to be a grant of the royal share of the revenue and not of the soil may have been prior to the recent decisions of the Privy Council, it is clear now that that presumption could no longer be pressed into service. It has been laid down by their Lordships of the Privy Council in several recent cases, such as *Suryanarayana v. Paranna* (1) and *Secretary of State for India in Council v. Laxmibai* (2), that there is no such presumption with regard to the grants, and that it is a question to be determined on the evidence in each

case as to whether it is a grant of the soil or of the royal share of the revenue. But it is also doubtful to my mind whether the presumption, such as it was before these decisions of the Privy Council, could have really applied to land situated in the city of Bombay. In the earlier reported cases, the Inam grants related to lands outside the city of Bombay which were regulated by considerations applicable to such grants. Taking the words of this grant, it is clear to my mind that what was intended to be granted was the land and not merely the royal share of the revenue or the produce of the land. In this view we are confirmed by the decision in *Doe v. M'Kenzie v. Pestonji*, (3). In that case the learned Chief Justice, Sir Erskin Perry had to consider the nature of this very grant. The conclusion reached in that case was that the effect of these documents was to give grantees a complete estate in fee of the lands so granted. No doubt the Government was not a party to that case. But it related to this very grant; and even taking it that it is not binding upon the parties to these proceedings, nor upon this Court of Appeal, it seems to me that the opinion expressed after a consideration of these documents, so far back as 1852, is entitled to great weight. With respect I agree with that opinion.

In this view it is hardly necessary to refer to exhibits upon which reliance is placed by Mr. Campbell on behalf of the respondent. But I may briefly refer to them. In Exhbs. Q, R, N and U this grant is referred to as being a grant of the land. In fact so late as 1909 the Government accepted the view that no claim on the part of Government should be made in respect of land held as Inam by the Lowjee family under the grant of 1783 and 1828, and in the preamble to the resolution, in Exh. U, the Collector described the grant of 1783 as being an out and out gift of the Government interest in the land. On the first branch of the argument, therefore, I am of opinion that the grant is not merely of the produce of the land but of the land itself.

(1) (1918) 41 Mad. 1012=45 I. A. 209=25 M. L. T. 30=1918 M. W. N. 859=23 C. W. N. 273=9 L. W. 126=29 C. L. J. 153=36 M. L. J. 585=21 Bom. L. R. 547=48 I. C. 689=1919 M. W. N. 463 (P. C.)

(2) 1923 P. C. 6=47 Bom. 327=50 I. A. 49=17 M. L. W. 405=32 M. L. T. 111=44 M. L. J. 471=25 B. L. R. 527=37 O. L. J. 464=28 C. W. N. 49 (P. O.)

(3) (1852) Perry O. C. 331

The next question is whether the grant conveys a right to the mines and minerals in the land. It is clear that there is no express reference to this right in the grant, and the whole question is whether having regard to the nature of this grant and the terms used in the absence of any express words conveying such right, whether such a right should be held to have been conveyed to the grantees or not. The learned Advocate General has relied upon the decision in *Secretary of State for India in Council v. Srinivasa Chariar* (4) which was the case of a Shrotriyam Inam in the Madras Presidency. He has also relied upon other decisions, of which *Raghunath Roy Marwari v. Raja of Jheria* (5) may be mentioned as a type. The line of argument is that unless there are express words conveying a right to mines and minerals, the grantees could not have any right to stones in this land, and the rule laid down in several decisions by their Lordships of the Privy Council in cases of leases by the Zemindars in Bengal in favour of their tenants is relied upon.

Apart from the decisions, it seems to me that looking to the terms of the grant in this case, it is a complete grant of all the interest which the Crown had at the date of the grant in these lands. That is the view which is taken by Sir Erskin Perry in 1852, to which I have already referred, and that is the view which we take of the nature of the grant in these proceedings, and if that be so, there is no rule which renders it absolutely necessary that express word referring to mines and minerals are necessary. It is quite true that in this Presidency generally outside the city of Bombay the words indicative of rights to mines and minerals, the words जल, तड़, तण, पाषाण निधि

निधि, jala, taru, trina, pashana, nidhi, nikshupa, are used to indicate that all rights in the soil are conveyed. But even there this Court has not gone so far as to lay down that the use of these words is absolutely essential to convey such rights. There have been cases in which in the absence of such words the grant has been held to be a grant of the soil, and where the grant is held to be a grant of the soil there can be no question, in my opinion, that the right to mines and minerals would be also included in the grant. The absence of such words does not necessarily indicate that such right was reserved to the Crown. In each case it is a question to be determined according to the terms of the grant and the circumstances of the particular case, as to whether the grant was complete or not. In the present case the grant was complete. No kind of right is reserved to the Government. Under these circumstances, even in the absence of words expressly referring to the right to mines and minerals, it seems to me that all the rights that the Crown had in this land were conveyed to the grantees, and that would include the right to mines and minerals. The statutory provisions, so far as they go, do not support the appellant's contention. For instance the reservation in favour of the Crown in S. 69 of the Bombay Land Revenue Code does not apply to alienated lands outside Bombay and there is no provision like that in Bombay Act II of 1876.

The decision in *Secretary of State for India in Council v. Srinivasa Chariar* (4), which has been relied upon, turned upon its own facts. In that case a village was granted as a Shrotriyam Inam. The purpose of the grant was that the grantee having appropriated to his own use the produce of the seasons each year, might pray for the prosperity of the Empire, and it was provided that he should pay a fixed yearly sum to the Sirkar. When the old grant in that case was settled by the Madras Government, the effect was to convert the tenure into a permanent freehold upon payment of a quit rent. On the terms of the grant in that case, the nature of

(4) (1921) 44 Mad. 421=8 I. A. 56=40 M. L. J. 262=1921 M. W. N. 111=29 M. L. T. 181=19 A. L. J. 201=25 C. W. N. 818=33 C. L. J. 280=60 I. C. 230=13 L. W. 592 (P. C.)

(5) (1919) 47 Cal. 95=46 I. A. 158=17 A. L. J. 597=36 M. L. J. 660=23 C. W. N. 114=16 M. L. J. 76=30 C. L. J. 160=21 B. N. L. R. 895=50 I. C. 849=10 L. W. 347 (P. C.)

which I have just referred to, their Lordships came to the conclusion that the grant did not include the right to mines and minerals. It is pointed out in that case that it must depend upon the language of the instrument and the circumstances of each case as to whether such a right can be deemed to have been conveyed or not, and a reference is made to the different opinions which the Government of Madras held with reference to the right to mines and minerals in the case of grants of the nature such as their Lordships had to deal with in that case. But briefly speaking, in my opinion, that case turned upon the construction of the grant in that particular case, which cannot be compared in any essential particular with the grant in the present case. Here we have a grant in favour of the two ship-builders by the Company in city of Bombay, and the object of the grant, so far as we can gather from the terms of the grant, was to benefit the grantees to as full an extent as possible without any kind of reservation. No kind of quit rent was reserved, and in fact no other right can be said to have been reserved under the grant. It is clear to my mind that the decision in this case cannot help the appellant.

As regards the other cases relied upon, I shall refer to the case of *Raghunath Roy Marwari v. Raja of Jheria* (5). So far as I can see the basic principle of this decision and other like decisions, it is that a Zamindar being the owner of the soil and also owner of the mines and minerals, when he gives a lease of any portion of the Zemindari, he creates a new estate and reserves the reversion to himself, and that in such a case in the absence of express words the right to mines and minerals cannot be held to have passed to the lessee. In fact in all those cases the reversion is reserved to the Zemindar, and the *ratio decidendi* of the cases is that where that is the case, in the absence of any express words conveying the right to mines and minerals, such a right cannot be held to have been conveyed. A reference was made to the case of *Giridhari Singh*

v. *Megh Lal Pandey* (6), in which the expression used was "*mai hak hakuk*" and the learned Advocate General has pointed out that even where such an expression was used the right to mines and minerals was held not to have been conveyed. In that case their Lordships have dealt with the point as to the meaning of the expression used. As I have said, the underlying reasoning of those cases is that as between the Zemindar and the holder, in whose favour the Zemindar has created a lease, there is a certain right reserved, and in the case of such reservation, unless there are words actually conveying rights to mines and minerals, those rights could not be said to be conveyed to the holder, but are reserved to the original grantor. In the case of *Raghunath Roy Marwari v. Raja of Jheria* (5) their Lordships have quoted with approval a passage from the judgment of Jenkins, J. pointing out the difference between a conveyance and a lease. The principle of these cases might apply if the grant here were in the nature of a lease. In the present case we have to deal with the case of a grant from the Crown to ship-builders, and to consider whether this can be put upon the same footing as a lease by a Zemindar of a part of his Zemindari. The grant here is not in the nature of a lease at all, and therefore, so far as I can see, the cases upon which reliance has been placed would not apply to the present case. After all we have to determine in this case on the terms of the grant as to what the nature of the grant was, and whether in the absence of the words actually conveying the rights to mines and minerals, all the rights of the Crown were conveyed or not. In my opinion all the rights of the Crown were conveyed by this grant to the grantees.

I would, therefore affirm the decree appealed from, and dismiss the appeal with costs.

Fawcett, J.—I agree that the appeal should be dismissed with costs.

(6) [1917] 45 Cal. 87—44 I. A. 246—22 M.L.T. 358—15 A. L. J. 851—33 M. L. J. 687—3 Pat. L. W. 169—26 C. L. J. 584—1917 M. W. N. 232—22 C. W. N. 201—42 I. C. 651—7 L. W. 90—20 Bom. L. R. 64 (P.C.)

Taking the grant as it stands, and the circumstances surrounding it, I think that it shows an intention to confer on the grantees the actual lands that had been selected by the Collector, yielding annually forty Moodas of Batty. That was a common way of specifying the extent of lands to be granted in those days. Several instances of the same kind will be found in the Bombay Gazetteer, Vol. XXVI, being part III of the Historical Materials for the Gazetteer of the Town and Island of Bombay, collected by the late Sir James Campbell. At p. 450 there is an instance in which the Board directed the Collector to mark off such of the rice lands belonging to the Honourable Company situated near Mancalla tank as might produce three Moodas and nineteen Pharas of rice, in order to give them as compensation to a cultivator who had converted waste lands into Batty grounds and whose lands had been taken for a certain ditch.

The circumstances, in my opinion, show that the Bombay representatives of the Company intended to show special favour to the grantee, and to give him all they could in regard to these lands. This is supported, in my opinion, by Exh. Q. under which the Governor in Council directs the Collector to give immediate and full possession of the lands to the grantees. Some stress can, I think, be rightly laid upon the words "full possession," as indicating a complete, as opposed to a partial, grant. The lands in question, at any rate the batty lands, would probably be occupied by cultivators or Kunbis, as they were then called, and the Parel lands of which these lands were a part, used to be leased to various farmers who dealt with the cultivators, as mentioned in the same Volume of the Bombay Gazetteer at pp. 448 & 448. The cultivators, however, were in those days treated by the Company as mere tenants-at-will, as is sufficiently shown by the proclamation of 1789 which is quoted in Vaidya's Bombay City Land Revenue Act, Introduction, pp. 17 and 18, and also in the Gazetteer of Bombay City and Island, Vol. II, pp. 352-53. There is an illustration of the little rights they were

considered to have in these lands, which is of some interest in connection with this question about quarries, given in Vol. XXVI part III of the Bombay Gazetteer already referred to. At page 429 we have an extract from the Diary of the Company in Bombay as follows:—

"At a Consultation of June 19, 1772, the Board record the following letter of the same date from Gaspar Dagon: Having the honour to farm the villages from Parel to Sion, the Kunbis have represented to me the losses they suffer by large pits in their batty fields dug for limestones and left open. It is extremely hard the Kunbis should suffer thereby and be obliged not only to fill them up at their own expense but to lose the cultivation of the ground by which they are unable to pay the Honourable Company's toka."

Then after quoting the substance of this letter the extract says:—

"Ordered that the Collector inquire into the custom heretofore practised in digging chunam stone and report the same."

That further report is not cited in this Volume. But that goes to show that the right to quarry was reserved to the Government or owner of the lands; and as there is no reservation of any kind in this grant, and the circumstances point to a full grant being intended, I think it should be taken as transferring the sub-soil rights.

The arguments that it was contemplated at the time that the grantees would continue the cultivation and thus obtain a revenue is no doubt true to a certain extent, but that is simply because at that particular time the land was so utilised. It could not, in my opinion, be contended that the grantees had therefore no right to use even the waste land appurtenant to these batty grounds for building purposes, and Government have, so far as I am aware, never laid any claim that the grant was restricted in that respect. The quarry rights would, as I have already shown, be in the possible contemplation of the Company at the time; and although the document is of a very informal nature, and not drafted in conveyancing language, yet it would have been perfectly competent for the drafters to have inserted a reservation of the quarry rights, if that was intended. The grant should no doubt be construed strictly in favour of the Crown,

that rule superseding the ordinary rule about construing a grant in favour of the grantee. But for the reasons I have given I do not think that that rule can overcome the considerations I have mentioned. It is no doubt true that in construing the terms of a deed the question is not so much what the parties may have intended, as what is the meaning of the words which they use: see *Maharaja Manindra Chandra Nandi v. Raja Sri Sri Durga Prashad Singh* (7). But the words used are, in my opinion, sufficient to convey a complete grant in fee, as was held by Perry, C. J., in *Doe d. McKenzie v. Pestonji* (3). That decision is, I think, one to which great importance must be attached in the present case, on the general principle that great importance is to be attached to old authorities on the strength of which many transactions may have been a justed and rights determined as said by Lord Loreburn in *West Ham Union v. Edmonton Union* (8) which was cited in *Chandra Binode Kunou v. Ala Bux Dewan* (9). Here titles have probably passed and been valued on the strength of this decision of Chief Justice Perry, and in view of that I think this Court should lean in favour of the construction that we put upon it. The document does not of itself indicate, at any rate clearly, that it was merely intended that the grantees should have the benefit of a certain amount of produce, as was indicated by certain expressions used in the grants considered in *Secretary of State for India in Council v. Srinivasa Chariar* (4) and *Raghunatha Koy Marwari v. Raja of Jheria* (5). I, therefore, concur in the order proposed by the learned Chief Justice.

Appeal dismissed.

★ ★ 1925 BOMBAY 18

MARTEN, J.

A. Cecil Cole—Plaintiff.

v.

Nanalal Moraji Dave and another—Defendant.

O. C. J. Suit No. 4879, of 1923, Decided on 4th July 1924.

★ ★ *Contract—An Agreement is not a hire purchase agreement unless hirer has option not to complete purchase.*

A hire purchase agreement and an agreement to sell are different. In the latter the property in the thing sold passes immediately to the purchaser while in the former there is not only no such immediate transfer of title but also the hirer is not bound to complete the purchase and can at his option return the thing at any time before the instalments are paid. An agreement is only one of sale though it may profess to be a hire-purchase one if it contains an obligation to pay the purchase money. *Heby v. Matthews* (1895) A. C. 471 and *Lee v. Butter* (1893) 2 Q. B. 318 Considered.

Davar— for Plaintiff.

Defendant No. 1 was not represented

Facts—The plaintiff entered into an agreement to sell "on hire purchase system" his motor lorries and other goods to defendant No. 1 for Rs 25000 and agreed to receiving the amount in instalments.

It was provided by agreement as follows:—"In case of failure to pay any of the instalments on due date, previous payments will be considered null and void and the lorries are not considered as sold until the final payment has been received. The purchaser has no right to mortgage or dispose of any lorries until the final amount has been paid and (the vendor) has the right to seize the lorries wherever they may be." Rs. 5000 were received by the plff. who delivered the lorries to defendant No. 1 and also wrote to the Commissioner of Police to transfer the lorries to the name of defendant No. 1. The first five instalments were duly paid: but default was made after that. The plaintiff filed the present suit to recover possession of the lorries or in the alternative the balance of the purchase money.

Marten, J.—[His Lordship stated the facts and continued:—] The first point that really arises is what is the nature of the agreement which the

(7) 1917 32 M.L.J. 559—22 M.L.T. 202—
(1917) M.W.N. 48—6 L.W. 110—21 C.W.
N. 707—25 C.L.J. 567—19 Bom. L.R. 493
—15 A.L.J. 432—8 L.C. 929—1 Lat. L.
W. 627—10 Pur. L.T. 229 (P.C.)
(8) [1911] A.C. 1—77 L.J. K.B. 85—98 L.T. 1
—72 J.P. 9—6 L.J.R. 39—52 S.J. 75—24
T.L.R. 108.
(9) [1921] 48 Cal. 184—31 C.L.J. 510—58 I.C.
353—44 C.W.N. 818 (F.R.)

parties entered into. Was it a hire-purchase agreement in the sense in which it is so understood in England, viz. no absolute sale, but only a hiring of the chattel by a person who has the option of returning it at any time before the various instalments are paid. Or on the other hand, despite the language which the parties have used, was it really a sale having regard to what the parties in fact agreed to do? Before I turn to the actual document in this case, I wish to keep these two points of principle clearly before me, so that when I come to the document, I can show what in particular are the relevant passages to be borne in mind.

Now there are two lines of authority illustrating what I have just said. The first line of cases illustrates a hire-purchase agreement proper, viz., where the hirer of a chattel has only an option to purchase the goods and is under no obligation to purchase. That is shown in *Helby v. Matthews* (1). A leading case on the other side of the line is *Lee v. Butler*, (2) where notwithstanding the fact that the parties spoke of themselves as being hirers and so on, and notwithstanding that it was expressly agreed that no property other than as tenant should vest in the hirer until the whole of the payments of rent thereby reserved should have been actually paid, the Court there held that the hirer of the goods had agreed to buy them notwithstanding the language used in the agreement.

Then if I turn to *Belsize Motor Supply Company v. Cox*, (3) the judgment of Mr. Justice Channell states the dividing line between these two classes of cases. In that particular case the owners of a motor vehicle let it to certain hirers for twenty-four calendar months at the rate of £15-12-2 per calendar month. On the signing of the agreement the hirers were to pay, and did pay, £50 on account of hire in advance, and each subsequent payment was to be made in advance on specified dates. The

hirers were not to re-let, sell or part with the vehicle without the consent in writing of the owners. But if the hirers should, on or before the expiration of the twenty-four calendar months, be desirous of purchasing the vehicle they could do so by making the amount of hire paid equal to the amount of £423-1-6. Then if the hirers did certain things, of which parting with the possession of the vehicle without the owners' consent in writing was one, it was made lawful for the owners and they were authorised to take possession of the vehicle and terminate the agreement. Then it appears that while the agreement was subsisting, there being a sum due and unpaid on account of hire, the hirers without the consent of the owners pledged the vehicle to a pledgee who took it in good faith and without notice of the owners' rights. Subsequently the owners on hearing of the pledge demanded the vehicle from the pledgee, who refused to restore it. At the date of this demand and refusal there was a sum of £58-9 due and unpaid on account of hire.

Mr. Justice Channell, in delivering the judgment, said (p. 250):—

"The first question is whether this case comes within the principle of *Helby v. Matthews* (1) or that of *Lee v. Butler* (2) and later cases of the same class. To decide that question I have to see whether in this agreement of December 10, 1910, the Burgess Company, the original hirers, bound themselves to buy the motor cab. The case of *Lee v. Butler* (3), which was not dissented from in *Helby v. Matthews* (1), decided that where the hirer has agreed to pay all the instalments of purchase money that amounts to an agreement to buy, and the case comes within s. 9 of the Factors Act, 1889, or s. 25 of the Sale of Goods Act, 1893. In *Helby v. Matthews*, (1) it was decided that, as the hirer had an option to return the goods, the case did not come within the sections. When those cases had been decided the case of *Hull Ropes Co. v. Adams* (4) came before a Divisional Court. No report of *Helby v. Matthews*, (1) had as yet been published in the *Law Reports*, and the Court reserved judgment until a report should appear. Having seen the report they decided that the facts in *Hull Ropes Co. v. Adams* (4) did not bring the case within the decision of *Helby v. Matthews*. There is no conflict between these cases. Where the agreement contains an obligation to pay the purchase-money it is an agreement to buy. In the present case there is a positive obligation to pay

(1) [1895] A. C. 471.

(2) [1893] 2 Q. B. 318.

(3) [1914] 1 K. B. 244.

(4) [1895] 65 L. J. Q. B. 144.

twenty-four instalments of £ 15 12 s. 2 d. That amounts to £ 374 12 s. There was also an obligation to pay on the signing of the agreement the sum of £ 50 'on account of hire in advance'. If £ 374 12 s. had been the entire sum which would have been necessary to enable the hirer to say that the cab was his property, the agreement would have been an agreement to purchase within the principle of *Lee v. Butler* (2); but £ 374 12 s. was short of the entire purchase money by the exact sum of £ 50 (6). If the hirers had both paid the £ 50 and all the twenty-four instalments they would have paid up the full amount required to purchase the cab; but the £ 50 would have been paid as deposit on account of purchase money in advance. The document on the face of it gives the hirers an option to purchase at any time by paying up the difference between £ 424 11 s. 6 d. and the sum already paid. That is an option which no doubt the hirers would probably exercise unless it proved valueless, but it is none the less an option when they had paid the twenty-four instalments to decline to proceed with the purchase, and to claim a return of the £ 50 deposit. In my view they were never bound to pay more than £ 374 12 s. They never bound themselves to pay the whole sum of £ 424 11 s. 6 d. The case therefore comes within the principle of *Helby v. Matthews* and not within *Lee v. Butler*."

Then I may mention one more case of *Lewis v. Thomas* (5) where the head-note runs:—

"A hirer of personal chattels under a hiring agreement which gives him an option to purchase them upon payment of all the agreed instalments of rent, but imposes upon him no obligation to do so, is not the 'true owner' of the chattels within the meaning of s. 5 of the bills of Sale Act (1878) Amendment Act, 1882."

There in effect the Court thought that the case came within *Helby v. Matthews*.

Then in India there is a case of *In re Linotype and Machinery, Ltd. and the Windsor press of Calcutta* (6), under the stamp Act, where the Court held that the document in that case was an agreement and not a conveyance. I do not think I need go into the details of that case.

There is one more authority in *Brij Coomaree v. Salamander Fire Insurance Company* (7), where it is pointed out that the rights of parties are governed by the provisions of the Indian Contract Act, and that if they agree to do certain thing, then in law certain consequences are

bound to ensue. Sir Francis Maclean there says (p. 823):—

"But, if you find in a contract certain terms from which, when they exist, the Legislature says that certain consequences shall ensue, these consequences must ensue; otherwise, it is difficult to see what object there can be in codifying the law upon the question. For these reasons I think that the property in the goods was in the plaintiff and that they were covered by the policy of insurance."

Now the very expression "hire purchase agreement" is not one that originated in this country. It is clearly a form of agreement which has originated in England and has been created by those engaged in the trade of particular articles. Substantially in this country there is little or no authority on hire purchase agreement. At any rate none has been cited to me, although there has been some reference to some unauthorised reports which I am told are not even in the Bar Library. Under these circumstances I propose to follow the distinctions adopted in the House of Lords between these two classes of authorities, and to consider whether in the suit agreement there was an obligation by the purchaser to buy. As was said by Lord Herschell in *Helby v. Matthews* (1) (p. 477):—

"Reliance was placed on the decision in *Lee v. Butler* (2), and it was said that the present case was not, in principle, distinguishable from it. There seems to me to be the broadest distinction between the two cases. There was there an agreement to buy. The purchase-money was to be paid in two instalments, but as soon as the agreement was entered into there was an absolute obligation to pay both of them, which might have been enforced by action. The person who obtained the goods could not insist upon returning them and so absolve himself from any obligation to make further payment. Unless there were a breach of contract by the party who engaged to make the payments the transaction necessarily resulted in a sale. That there was in that case an agreement to buy appears to me, as it did to the Court of Appeal, to be beyond question."

Then his Lordship stated the portions of the suit agreement and proceeded, as follows:—] Now was there any option to the purchaser to return these lorries after, say, he had paid four instalments? In my opinion there was not. The agreement begins with an agreement to sell. I agree the words "on the hire purchase system" follow, but nevertheless it is an agreement to sell for Rs. 25,000, and it is

(5) [1919] I. K. B. 319.

(6) [1916] 44 Cal. 72.

(7) [1905] 32 Cal. 816.

to be "in consideration of payment as under." Then lower down the agreement provides: "The consideration is to be paid as under" and a list of instalments is given which makes up the full purchase-price of Rs. 25,000. I read that document as meaning that the purchaser was bound in any event to pay the whole of this consideration of Rs. 25,000, and that it would be a breach of contract on which he could be sued if he failed to pay up any of the instalments. I do not overlook the fact that the agreement provides that "in case of failure to pay any of the instalments on due date previous payments will be considered null and void." But that may be referable to the kind of measure of damages that the parties had in mind. I cannot consider those words as implying that the purchaser had an option to return the vehicles provided he forfeited the past instalments actually paid.

Then there is a provision that "the lorries are not considered as sold until the final payment has been received." But there again one must consider what is the principle on which the dividing line in the above cases has been laid down. If then there was a sale, on the true construction of this document, I cannot read this clause as meaning that the property was not to pass notwithstanding that the purchaser definitely agreed to buy the lorries and took delivery of the lorries there and then, and agreed to pay the purchase money by instalments. If one turns to S. 78 of the Indian Contract Act, it is clear that in such a case the property in the goods would ordinarily pass.

There is one further point that the agreement speaks of delivery of all the lorries having been given that day. That is an expression which is applicable as between a vendor and a purchaser. For a mere hirer who has taken the goods on hire, delivery perhaps is not quite the apt word to use.

Then similarly the fact that the motor lorries are to be transferred to the name of the purchaser in the motor register kept by the Commissioner of Police, is at least in keep-

ing with the view that the defendant was to be the purchaser although the purchase money was to be paid by instalments. At the moment I have only before me the Act itself, viz., The Indian Motor Vehicles Act, 1914, S. 10 of which provides: "The owner of every motor vehicle shall cause it to be registered in the prescribed manner." The rules under that Act which are before me are "The Bombay Motor Vehicles Rules, 1915" which are set out in "The motorists' Guide (India). 2nd Edn." of Mr. Giles, Head Police Office, Bombay. But I am informed by counsel for the plaintiff that since then other rules have been issued by Government, particularly in connection with motor lorries, and that under those rules a person who plies a vehicle for hire and some other persons who are not necessarily the true owners have to be registered. If that is so, then the point that these lorries were to be transferred to the name of the defendant is not so significant as it otherwise would have been.

What has really happened here is that is a home-drawn document, in which the parties have talked glibly about a hire purchase agreement without really understanding what it means; and I have to make the best sense I can of it. In my opinion on its true construction it was really a sale where payment was to be made by instalments, and it comes within the principle of *Le v. Bulr* (2) and not within *Helby v. Matthews* (1). Under these circumstances, in my opinion, the property in these lorries passed to the purchaser on the execution of the document.

That being so, the relief which the vendor is entitled to is to claim the balance of the purchase money for goods sold and delivered. It will be seen on looking at the plaint, prayer (d), that the plaintiff's claim is put in the alternative there, viz., first for unpaid instalments and also for damages, and alternatively "in the event of this Court holding that there was an agreement of sale of the said nine lorries to the first defendant by a writing dated May 21, 1923, the first defendant may be ordered to pay to the plaintiff the balance of the

price, viz., Rs. 12,000, with interest thereon at nine per cent, per annum from November 1, 1923." That, in my opinion, is the relief which the plaintiff is entitled to as against defendant No. 1.

[The judgment then dealt with other aspects of the case not material to this report and concluded:—]

Accordingly there will only be a decree for the plaintiff against defendant No. 1 for Rs. 12,000 and interest at nine per cent per annum from November 1, 1923, to judgment. There will be costs and interest on judgment at six per cent.

Decree accordingly.

★ ★ 1925 BOMBAY 22

SHAH, Ag. C. J. AND FAWCETT, J.

Lakshman Baburao Sonar—Appellant.

v.

Ramchandra Rajaram Sonar—Respondent.

Appeal from Order No. 10 of 1922, Decided on 27th June 1924, from the First Class Sub-ordinate Judge at Ahmednagar in Suit No. 434 of 1916.

★ (a) *Civil P. C., Sch. II Para 11—Scope is limited to questions of law.*

The scope of paragraph 11 is really limited to questions of law. It is true that it is not expressly stated in this paragraph that the statement of the special case must relate to questions of law; but sufficient indication in this direction is given as to the scope of this rule by the wording of the form No. 4 of the Appendix to this schedule which expressly refers to questions of law to be stated for the opinion of the Court. [P. 23, C 2; P. 24, C. 1.]

★ ★ (b) *Limitation Act. Art. 158—When special case is stated limitation runs after court expresses opinion.*

When arbitrator states special case, award is completed when court expresses its opinion and period of limitation begins only thence.

[P. 25, C. 1.]

H. C. Coyajee with Y. V. Bhandarkar— for Appellant.

G. N. Thakkar with D. C. Virkar - for Respondent.

Shah, Ag. C. J.—It is necessary to state a few facts for the purposes of this appeal. A suit for partition was filed by Ramchandra in April 1916. On July 29, 1918, this matter was

referred to arbitration through the Court. Apparently the arbitrators could not agree, and we have on the record a report of one of the arbitrators dated June 4, 1919. Then the matter was referred to an umpire. He made his first award apparently on November 29, 1920 but the Court remitted the matter for reconsideration to him on the same day. On October 7, 1921, he prepared an award with the statement of a special case for the opinion of the Court. In that statement of the case the following three questions were stated by the umpire:—

1. Does plaintiff prove that the ornaments mentioned in the plaint are in the possession of the defendants and whether the same are joint?

2. Does defendant prove Rajaram was handed over ornaments worth Rs. 40,011 in 1895?

3. Does defendant prove that ornaments worth Rs. 10,500 or of any less sum is with the plaintiff still to which the defendant is entitled?

The learned Judge considered that it was doubtful whether the award was in proper form of a special case within the meaning of paragraph 11 of the second schedule of the Civil Procedure Code. He thought that the umpire should have expressed it in more precise and clearer language. The result was that the award was remitted to the umpire in order that he may either himself determine the point left undecided or he may state his award on that point in the form of a special case for the opinion of the Court under rule 11 of the second schedule. If he still thought that the question of ornaments should not be decided by him but should be stated as an award in the form of a special case, leave was granted to him to do so. This order was made by the Court on November 7, 1921. Ultimately the umpire stated the special case for the opinion of the Court on November 16, 1921. That statement is to be found at pages 36 and 37 of the paper book. It is enough to state that the questions for the opinion of the Court remained practically as they were stated before.

The learned Judge after hearing the parties decided the questions which were stated for his opinion on November 30, 1921. The reasons for

this opinion are stated at length in the judgment which he delivered on that day, and he at once proceeded to pass a decree in terms of the award as completed by his opinion.

Defendants Nos 1-3 have appealed to this Court from this order of November 30, 1921. Two points have been urged in support of this appeal. First, it is contended that on a proper interpretation of paragraph 11 of the second schedule, the points for the opinion of the Court must be points of law, and not of fact. The questions referred to the Court for opinion being questions of fact, it is urged that the special case stated to the Court for its opinion under paragraph 11 was not competent. Secondly, it is urged that in any case the lower Court should have given time to the appellants to file their objections to the award as finished on November 30, as contemplated by paragraph 16 of the schedule, and as provided in Article 158 of the Indian Limitation Act, Schedule I.

As regards the first point, it is urged that the Form of the Special Case given in the Appendix to this Schedule (Form No. 4) indicates that the questions to be stated in the form of a special case should be questions of law, and a reference is made to paragraph 23 according to which the forms set forth in the Appendix with such variations as the circumstances of each case require are to be used for the respective purposes therein mentioned. It is further urged that so far as the present point is concerned paragraph 11 substantially corresponds to S. 7, cl. (b), of the English Arbitration Act of 1889, 52 & 53 Vic. c. 49. That section provides that the arbitrators or umpire acting under a submission shall, unless the submission expresses a contrary intention, have power, among other things, to state an award as to the whole or part thereof in the form of a special case for the opinion of the Court. It is contended that under this section of the English Statute, the special case has been held to mean a statement relating to questions of law for the opinion of the Court. It is urged that if that is the

meaning of the expression "special case," used in the English Arbitration Act, and if paragraph 11 of the second schedule of the Civil Procedure Code is enacted for the purpose practically in the same terms as S. 7 of the English Act, the same meaning should be put upon that expression, and that the scope of the special case contemplated under paragraph 11 should be limited to questions of law. Our attention has not been invited in the course of the argument to any Indian decision on the point.

On behalf of the respondent-plaintiff it is urged that though the legislature has expressly provided in S. 10 of the Indian Arbitration Act IX of 1899 that the special case shall be stated on questions of law, there is no such limitation in the wording of paragraph 11 of schedule II of the Code, and that the Court should not read these words of limitation in the statute when the legislature has not thought it proper to so limit the scope of the rule. It is further urged that the indication afforded by the form cannot be taken as decisive of the point, and that it should not be used even as indicating that the scope of the rule contained in paragraph 11 is limited to questions of law. It is also pointed out that under Order 36, Civil Procedure Code, which contains rules about special cases to be stated by the parties for decision of the Court, there is an express reference to questions of fact and of law. It is urged that that is the meaning which should be put upon the expression "special case" occurring in paragraph 11 of the second schedule.

After a careful consideration of the arguments on both sides, I have come to the conclusion that the scope of paragraph 11 is really limited to questions of law. It is true that it is not expressly stated in this paragraph that the statement of the special case must relate to questions of law; but it seems to me that sufficient indication in this direction is given as to the scope of this rule by the wording of the form No. 4 of the Appendix to this schedule which expressly

refers to questions of law to be stated for the opinion of the Court.

Further it seems to me that this expression when used with reference to arbitration has been understood in that sense so far as the English statute is concerned. That is clearly indicated in the remarks at pages 142 and 143 in Russell on Arbitration and Award, 10th Ed., bearing on this clause of S. 7 of the English Arbitration Act. The decision in *North and South Western Junction Railway Co. v. Assessment Committee of the Brentford Union* (1) supports the appellants contention. The following observations of Lord Halsbury appear to me to be material to our present purpose:—

"But the case as stated in each of the alternative propositions suggests to your Lordships for decision questions of fact, and even suggests the question which of two alternative methods is the best for arriving at the conclusion of fact. My Lords, no Court has ever given directions in such a case. As the Master of the Rolls said, when the process by which the conclusion has been arrived at has been set forth the Courts have decided whether or not the process so adopted was in accordance with or against the provisions of the statute. I asked the very learned Counsel who argued the question whether he could point to a single instance where a Court had given directions as to the preferable course when it was submitted that neither course was in itself contrary to law...

"I am, therefore, of opinion, my Lords, that your Lordships should avoid establishing a precedent which has never, I believe, hitherto been adopted, namely of giving directions to the arbitrator how he should arrive at the fact.

In that case the matter was remitted to the arbitrator and the Court declined to express any opinion upon the question stated for the opinion of the Court. This decision was in the year 1888. But the provision contained in S. 7 (b) of the English Arbitration Act is in substance a reproduction of the provision which was then in force (see 17 & 18 Vic c 125, s. 5.)

That is the interpretation of this expression under the English statute. The clause we have to construe is enacted for the same purpose. Having regard to the indication given by the legislature by the wording of the form given in the Appendix to Schedule II of the Code, it is fair to put

the same interpretation upon the expression "special case" within the meaning of paragraph 11 of Schedule II of the Code. It may be mentioned that the corresponding S. 517 in the Code of 1882 was almost in the same words, but there was no form in that Code such as we have in the Code of 1901.

No doubt the consideration urged on the other side is that the specific words used in S. 10 (b) of the Indian Arbitration Act are not to be found in this paragraph 11 of the second schedule, and that the Court should be slow to read words in a statutory provision which are not there. I have given due weight to this consideration; and I recognise its force. But I am unable to think that the wording of paragraph 11 was intended to have a more comprehensive scope than clause (b) of S. 10 of the Indian Arbitration Act. The express reference to questions of fact or law in Order 36 rule 1 does not appear to me to present any difficulty. In fact it affords an indication, if at all, that the scope of paragraph 11 is limited in the sense contended for by the appellants. If the reference to the Court was to be on questions of fact and law, the legislature would have expressly said so, and where the purpose of the reference to arbitrators is to have the questions decided by the arbitrators, it does not seem to have been contemplated by the legislature that the arbitrators could really refer back the matter on questions of fact to the Court for the opinion of the Court. Paragraph 11 is clearly intended to meet a class of cases in which any question of law which the arbitrator or umpire may feel himself unable to decide can be referred to the Court for its opinion with the leave of the Court. I am, therefore, of opinion, after a consideration of the arguments, that the special case stated for the opinion of the Court went beyond the scope of paragraph 11 of the second schedule, and that it was not open to the Court to decide questions of fact raised by the umpire. It was for the umpire to decide them.

As regards the second point, it appears to me that the award would be

(1) [1888] 13 App. Cas. 592—60 L. T. 274—58 L. G. M. C. 95.

completed when the Court would express its opinion upon the case submitted to it for opinion. Until then there was no complete award, and the parties were not called upon to file their objection, if any, to the award, until that was done. It was not open to the Court to direct on that very day, i.e. on November 30, that a decree should be passed in terms of the award. The parties should have been given the necessary period contemplated by Article 158 after the award was complete. That was not done and it seems to me that the second objection urged on behalf of the appellants is good. It is however immaterial having regard to the view which we take of the first point. The question as to what order we should make under the circumstances is not easy. This arbitration has been allowed by the Court to take a very leisurely course. The umpire has taken considerable time over the matter and has even expressed his inability to decide certain questions in his statement of the case. The Court cannot compel the umpire to decide them. But on the whole I think that we should remit the matter to the umpire so that he may have an opportunity of completing the award.

The result is that we set aside the order made by the learned Judge on November 30, 1924, and remit the matter to the umpire. We allow one month's time to the umpire from the date when he receives the papers back to complete the award. The appellants to have their costs here and the costs in the lower Court in connection with these proceedings.

Fawcett, J.—I agree. I think that special weight must be attached to the form of special case provided in the Appendix to the second schedule of the Civil Procedure Code. That form is copied almost word for word from the form of special case appended to the second schedule of the Indian Arbitration Act and having reference to S. 10, cl. (b), of that Act under which a special case is confined to questions of law. There is no such form appended to the English Arbitration Act of 1889, and there was no such form appended to the Code of 1882, so that it is obvi-

ous that the form was copied from that appended to the Indian Arbitration Act, as already mentioned. That form is put in a way which clearly contemplates nothing but questions of law being submitted for the opinion of the Court, in contra-distinction to the facts which have to be first stated by the arbitrator; and if the legislature had intended that questions of fact might be raised in a special case, I think the form would not have been put in that positive form. The forms can be looked at as a useful guide to interpreting a doubtful expression in an Act, as was done, for instance, by the Privy Council in *Fatteh Chand Sahoo v. Lelumber Singh Doss* (2). I think also that, as this paragraph 11 is obviously based on the corresponding enactment in S. 7 of the English Arbitration Act, and reproduces it practically word for word, with the addition of the words "with the leave of the Court," it must be taken that legislature had regard to the practice of the English Courts under which such special cases are confined to questions of law. The whole basis of arbitration is that the arbitrators should themselves decide questions referred to them. But it is recognised that they should be allowed the assistance of experts who have special knowledge in regard to matters of science etc., and the whole object of allowing arbitrators to state a special case for the opinion of the Court is that they may have the benefit of the Court's explicit decision on questions of law or that the award should be made dependent on the opinion of a Court on these legal questions arising. The case of *Jiphsen v. Hawkins*, (3), cited in Russell on Arbitration and Award, 10th Ed., p. 140, is an instance where the Court objected to the arbitrator leaving it to the Court to draw inferences of fact. It was there held that this was not a proper exercise of the duties entrusted to them, as having heard the evidence and seen how it was given, the arbitrators should have drawn the inferences of fact. Still more should an arbitrator, who has

(2) [1871] 14 M.I.A. 129—9 B.L.R. 433—16 W.R. 26 (P.C.)

(3) [1841] 2 M. & G. 366—2 Scott (N.R.) 605.

actually taken the evidence, decide the questions of fact that arise, however difficult they may be, and it is quite outside the proper scope of arbitration for the arbitrator to put on the Court the responsibility of deciding such questions of fact. It really takes the case from the hands of the arbitrator to whom the parties have confided the decision by the reference to him. The Court clearly has no jurisdiction in the matter while this reference remains in force. The umpire is, according to our information, still available, and therefore, there seems to be no alternative but to do what the Subordinate Judge should have done, that is, to have refused to act upon this so called award upon a special case, and returned the case to the umpire to decide it himself. I agree, therefore, in the order proposed by the learned Chief Justice.

Order set aside.

★ ★ 1925 BOMBAY 26

SHAH, AG. C. J. AND FAWCETT, J.

King Emperor—Appellant.

v.

Rachappa Murigeppa Shabedi—Accused

Cr. Appeal No. 309, of 1921, Decided on 15th August 1924 from an order of acquittal passed by the First Class Magistrate at Bijapur.

★ ★ Penal Code, S. 294-A—Publication that tickets of unauthorised lottery are sold at particular place is no offence under S. 294 A.

The publication that lottery tickets can be had at a particular place is not sufficient to constitute a publication of a proposal to pay any sum on any event or contingency relative or applicable to the drawing of any ticket in any lottery not authorised by Government as provided in the second paragraph of S. 294 A. [P. 26, C. 2]

S. S. Patkar, Government Pleader—
for the Crown.

A. G. Desai—for Accused.

Shah, Ag. C. J.—his is an appeal by the Government of Bombay against the order of acquittal made in a summary trial at which the accused was charged under S. 294 A, Indian Penal Code. The act charged

against him was that he published a hand-bill relating to his shop in which on a side the following print appeared "Goa Lottery tickets can be had at our place (i. e. shop)." The learned trial Magistrate did not accept the contention for the Crown urged before him that this constituted an offence under the second paragraph of S. 294 A. In other words he did not accept the contention that this constituted a publication of a proposal to pay any sum, on any event or contingency within the meaning of the section. Apparently at the trial an attempt was made to show that the accused in fact had sold some tickets of this lottery, but that attempt did not succeed. We are not concerned in the present case with the question as to whether it would be an offence under the section to sell a ticket relating to a lottery, which is not sanctioned by the Government under S. 294 A, and I desire to make it clear that in dealing with this case we express no opinion on that question.

The publication that Goa lottery tickets can be had at a particular place does not appear to me to be sufficient to constitute a publication of a proposal to pay any sum on any event or contingency relative or applicable to the drawing of any ticket in any lottery not authorised by Government as provided in the second paragraph of S. 294 A. If there had been an advertisement about the lottery itself, the position might have been different. It is difficult to say that the publication of a reference to the tickets about an unauthorised lottery is prohibited by S. 294 A.

Whether it would constitute abetment of an offence punishable under S. 294 A is a matter with which we are not concerned. The accused was not charged with abetment and we are not in a position to ascertain fact on this record, which it would be necessary for us to know in order to determine the question of abetment, if he were so charged.

In this appeal the only question is whether the publication I have referred to constitutes an offence under S. 294 A, and I am unable to

hold that it constitutes such an offence. We dismiss the appeal.

Fawcett J. I concur. We have to construe this section strictly as it is a penal enactment, and I think it is impossible to extend the words "publishes any proposal to pay any sum," which is the only part of the second paragraph which could apply to the present case, so as to cover a proposal to sell tickets of the kind now in question. If the legislature wants such a proposal to be covered I think it will be necessary to amend the Act on the lines of the corresponding English statute.

Appeal dismissed

1925 BOMBAY 27

MACLEOD, C. J. AND CRUMP, J.

The Secretary of State for India in Council—Defendant—Appellant.

v.

Bhatt Laxmishanker Govindram and another—Plaintiffs—Respondents.

Appeal from Original Decree No. 151 of 1921. Decided on 14th March 1923, against the decision of the District Judge, Ahmedabad in Suit No. 71 of 1918.

Neighbours—Vacant site between houses presumably belongs to neighbours.

Until the contrary is proved, it may generally be presumed, that the open space in a pole belongs to the owners of the surrounding houses, and it would be for the owners of the other houses and not the municipality nor the Government to protest against any obstructions caused by the owner of one house against their common rights.

[P 27 C 2; P 28 C 1]

The Government Pleader—for Appellant.

M. B. Dave—for Respondent.

Judgment.—The plaintiffs are the owners of house No. 1772 situated in the street behind the Post Office in the town of Borsad. In front of their house there is an *Ota* which had been there for a considerable time on which the plaintiffs used to stack fire wood, and keep cots, quilts and benches. In 1916 a survey was made of the town and the Inquiry Officer on the 14th August 1916

decided that the land on which the plaintiffs' *Ota* stood was street-land. The plaintiffs appealed to the Assistant Collector. The appeals were rejected and consequently the suit had to be filed asking for a declaration that the land in suit was of their possession and for a permanent injunction restraining the defendants, the Municipality of Borsad and the Secretary of state for India in Council, from dispossessing the plaintiff of the said land.

The plaintiffs' suit was decreed by the District Judge on the ground that they had proved that they were the owners of the land in dispute, although they had not proved that they became owners by adverse possession beyond the statutory period. The plaintiff had only a possessory title and, therefore, they could only be owners by adverse possession. But the plaintiffs being in possession, the defendants would have to prove a better title before they could interfere with their possession. The evidence itself did not show that the defendants had title to the suit land. It was merely asserted that the land was a street-land. But it was not suggested in any way in the evidence why it was street-land except that the Inquiry Officer said it was. If it had been stated that all the land from the foundations of one row of house on one side of the street up to the foundations of the other row of houses on the other side, was street-land, we could understand that there might be some substance in the finding of the lower Court. But the defendants have not even endeavoured to prove that this was a public street. Admittedly, the houses of the plaintiffs and the houses of the neighbouring owners formed a *cul de sac*, as there was no thoroughfare. The open space between the houses could only be used by the owners of the houses, and those who visited them. It has not even been shown that the land formed a public road within the meaning of that expression in section 37 of the Land Revenue Code. Until the contrary is proved, it may generally be presumed, that the open space in a *pole* belonged to the owners of the surrounding houses, and it

would be for the owners of the other houses to protest against any obstructions caused by the owner of one house against their common rights. Considering the unsatisfactory nature of the evidence in this case, it is difficult for us to hold that the decision of the District Judge was wrong, and accordingly we must dismiss the appeal with costs.

It is desirable that when appeals of this character come up before the High Court, that the Court should be provided with suitable plans to enable it to follow the case, as the plan which was presented to us, apart from its being in the vernacular, is most inadequate.

Appeal dismissed.

★ ★ 1925 BOMBAY 28

SHAH, AG. C. J. AND FAWCETT, J.

Harichand and Co. — Defendants — Appellants.

v.

Gosho Kabushiki Kaisha, Limited — Plaintiffs—Respondents.

O. C. J. Appeal No. 17 of 1924, Decided on 14th July 1924, from Suit No. 4285 of 1921.

(a) *Contract Act, S. 73*—Plaintiff must mitigate loss—Vendor with right to resell at any time, on vendee's default to pay by due date need not resell immediately but must do so within reasonable time—otherwise he can get damages only on basis of difference between contract and market rates at date of breach — *Contract Act, S. 107—Damages*.

A plaintiff who sues for damages owes the duty of taking all reasonable steps to mitigate the loss consequent upon the breach and cannot claim as damages any sum which is due to his own neglect. [P. 30, C. 2]

Where the vendor had the right to resell the goods at any time if vendee failed to pay and take delivery by certain date and where vendee made default,

Held: that the vendor was not bound to resell the goods immediately after the default but could do so within a reasonable time afterwards, but that in view of the persistent refusal of the vendee to take the goods and the falling state of the market, the vendors were bound not to delay in reselling. Should the vendors make unreasonable delay, they can recover only damages on the ordinary basis of the difference between contract rate and market rate at date of breach. 19 All. 535, Diss. from. [P. 31, C 1 2]

★ ★ (b) *Contract Act, S. 73* — Clause empowering vendor, on vendee's default to pay on due date, to resell at any time and on such terms and conditions as vendor might decide is valid, provided vendor acts within its limits—*Contract Act, S. 107*.

Clause in contract entitling vendor on vendee's default, to pay for and take delivery on due date, to resell goods at any time and on such conditions and terms as vendors might decide, is valid and the vendors can recover the full damages ascertained on that basis provided they act within its limits. 1924 Bom. 390, explained; 25 Cal. 505 relied on.

Coltman with *Julah* — for Appellants.

Campbell with *Lalji* — for Respondents.

Facts.—The plaintiffs and the defendants entered into a contract whereby the plaintiffs were to sell goods to the defendants who were to pay for and take delivery of the goods within 60 days of the arrival of the steamer and if delivery was not taken within that period whatever might be the cause, the sellers were to be at liberty at any time to sell the goods by private sale or public auction. The contract was numbered "9/5" but in transmitting it to the manufacturers the plaintiffs renumbered it "10". When the goods arrived in Bombay, the defendants paid for and took delivery of two lots of four bales each. On the very next day after the receipt of the 2nd lot the defendants noticed number "10" on the delivery order and on the bales and thinking that the goods were not of their contract, complained to the plaintiffs for having passed on to them goods ordered out for another merchant. After this, on April 5th, 1921 the defendants wrote another letter to the plaintiffs asking them to treat the contract as regards the remaining bales as cancelled and intimating that the four bales were lying at plaintiffs' risk. Further correspondence followed between the parties, the defendants charging the plaintiffs with having passed off goods under other contracts to them. Later on, the defendants called upon the plaintiff's on May 6 to produce all papers to disprove their complaint. The complaint was repudiated by the plaintiffs who also offered on May 17 inspection of the papers. The offer was declined out

the same day by the defendants, on the ground that it was made too late in view of the falling market. Then the goods were resold by the plaintiffs on May 25, 1921 and sued to recover the loss arising on the re-sale.

Fawcett, J. — [His Lordship after reviewing the facts and the correspondence between the parties, continued:—]

We agree there was a clear breach on April 5, 1921, and that this was not affected by the subsequent negotiations which broke down on May 17.

The only other point in dispute was whether the plaintiffs were entitled to recover the loss resulting from the re-sale on May 25 as damages, and on this point the Judge held that, though clause 15, [the relevant portion of clause 15 ran as follows:—

" . . . and if delivery be not taken within the above-mentioned period of sixty days whatever be the cause, the sellers shall be at liberty at any time to sell the goods by private sale or public auction, in such manner and on such terms.] . . ."

says the plaintiff's can sell at any time, this must be taken to mean at any reasonable time. He also held that the plaintiffs were not unreasonable in waiting till May 17 before taking steps to sell the goods, and that the actual sale on May 25 was within a reasonable time of the defendants' final repudiation of May 17. Accordingly he decreed 'the plaintiffs' claim.

The defendants appeal on the ground that the lower Court erred in awarding damages on this basis, and that it should have held that the correct measure of the plaintiffs' damages was the price of the goods ruling on April 6, 1921.

Mr Coltman for the appellants does not dispute the plaintiffs' right to re-sell the goods under clause 15 of the contract, and get the benefit of the special damages stipulated for therein, but he contends that the resale should at latest have taken place within a week of April 5, and that as the plaintiffs failed to do so, they cannot recover damages on the ordinary basis of the difference between the contract rate and the market rate at the date of the breach. Mr. Campbell for the respondents did not dispute the con-

struction put on clause 15 by the learned Judge that the resale should be within a reasonable time, and it may be noted that the clause does not expressly give the plaintiffs an uncontrolled discretion as to the time or times of resale, as did the contract in *Best v. Haji Muhammad Sait* (1). The sole question, therefore, is whether the resale did take place within a reasonable time.

The main principles which govern the question as to what is a reasonable time in a case of this kind are, in my opinion, correctly stated in *Prag Narain v. Mul Chand* (2). It was a case falling under S. 107 of the Indian Contract Act, but the judgment proceeds on general principles. It says (p. 539):—

S. 107 in explicit terms requires that if the seller who has a lien for the unpaid price wishes to re-sell the goods sold, he must allow a reasonable time to elapse between the date of his giving notice to the buyer of his intention to re-sell and the date of the re-sale. But the section does not in terms provide that the right to re-sell should be exercised within a reasonable time from the date of the breach of contract. On this point the section is silent. We have therefore to look to general principles as a guide for determining the question whether a buyer who wishes to re-sell the goods sold must do so within a reasonable time from the date on which the contract was broken or whether he may do so at any time after the date of the breach. A buyer, it is true, may claim the price at any time after the stipulated date for payment has expired, if not precluded from doing so by the law of limitation, but if he chooses to enforce his right to re-sell, he must, it seems to us, do so within a reasonable time from the date of the breach, and should not allow the value of the goods to depreciate by making undue delay in re-selling them. In *Mayne on Damages*, 5th Ed., p. 176, it is stated on the authority of *Poit v. Flather* (3) that 'as there is no obligation on the part of the vendor to sell at all, so if he refrains from selling at the time of the breach he takes upon himself all risk arising from further depreciation.' In *Addison's Law of Contract*, 9th Ed., p. 526, the rule on the subject is thus stated:—'If the goods have been re-sold by the vendor within a reasonable time after the breach of contract by the purchaser, the measure of damages will be the difference between the price agreed to be given and the price realised on the re-sale, with the costs and expenses of the re-sale, but if the re-sale has been unreasonably delayed until the market has fallen, the price realised on such re-sale, will not afford a true criterion of the damage.' These are authorities for holding that if the

(1) [1898] 23 Mad. 18

(2) [1897] 19 All. 535 = (1897) A.W.N. 150.

(3) [1847] 16 L.J. Q.B. 36 = 75 Railu Cas.

seller elects to re-sell, he must do so "within a reasonable time from the date on which the contract was finally repudiated by the buyer. An other conclusion might cause undue hardship to the buyer. A seller may, with the deliberate intention of causing loss to the buyer, delay the re-sale until the market has fallen and then re-sell the property, and thereby cause to the buyer a loss which he might not have sustained had the re-sale taken place within a reasonable time from the date of the breach of contract. In the case of a re-sale the buyer is entirely deprived of his property and that distinguishes the case of a claim for damages on a re-sale from that of a claim for the unpaid price. In the latter case the buyer would get the property and be in a position subsequently to compensate himself by waiting for a rise in the market. In our opinion the plaintiffs ought to have re-sold the shares sold by them within a reasonable time from the date on which the contract was finally repudiated by the defendant in that case.

The passages there cited from Mayne's and Addison's works have reference primarily to the case where a re-sale within a reasonable time may be accepted as evidence of actual value at the date of the breach of contract: cf. *Jugmohandas v. Nusserwanji* (4). But in so far as they are based on the general principle that the seller is bound in all cases to take any reasonable steps which are open to him to reduce his loss (cf. Halsbury's Laws of England, Vol X, S. 615 at p. 35) they seem to me to apply equally to a case of this kind. This general principle is enacted in the Explanation to S. 73 of the Indian Contract Act, and qualifies the plaintiffs' right to recover the resulting loss from the re-sale of May 15 as compensation for a loss "which the parties knew, when they made the contract, to be likely to result from a breach of it." As an illustration of its application reference may be made to *British Westinghouse Electric and Manufacturing Company, Limited v. Underground Electric Railways Company of London, Limited* (5) where it is laid down that in assessing damages for breach of contract the fundamental basis is compensation for pecuniary loss naturally flowing from the breach, but this is qualified by the plaintiff's duty to mitigate the loss consequent on the breach, and he cannot claim any part of the damage which is due to his

neglect to take such steps. And in *Jamal v. Moolla Dawood Sons and Co.* (6) their Lordships at p. 502 say:—

"It is undoubted law that a plaintiff who sues for damages owes the duty of taking all reasonable steps to mitigate the loss consequent upon the breach and cannot claim as damages any sum which is due to his own neglect.

This necessarily applies with a special force to a case like this where the market value of the commodity re-sold is subject to daily or similar rapid fluctuations. In the present case it is common ground that the market was falling throughout April and May 1921, and references to this are contained in the correspondence. It is probable, as the plaintiffs allege, that the defendants wanted to back out of their contract on this account, and the objection they raised to accepting the goods is now admitted to be untenable. In these circumstances it may be said that plaintiffs might reasonably wait for some time before taking the extreme step of re-selling the goods, in the hope that defendants would not persist in their refusal. And if there had been in April any indication of a weakening on defendant's part, e.g., by a proposal such as they made in their solicitors' letter of May 2, so that negotiations could be said to have been going on, I would concur with the learned Judge's view that the plaintiffs were not unreasonable in waiting till May 17. But the clear facts are that the defendants met the threats of a re-sale, which plaintiffs gave in their letters of April 12, 18 and 20, either by silence or a mere reference to their definite refusal of April 5: see defendants' letter of the 19th and their solicitors' letter of the 21st. Having regard to the plaintiffs' duty to take all reasonable steps to mitigate the damages and to the falling market, I can see no sufficient justification for the plaintiffs not acting on their solicitors' notice of April 26 that they would re-sell the goods, unless the defendants took the bales within two days. I think that plaintiffs should

(4) [1902] 26 Bom. 744=4 Bom. L.R. 504.

(5) [1912] A.C. 673=81 L.J., K.B. 1132=107 L.T. 525=56 S.J., 734.

(6) [1915] 43 Cal. 493=13 I.C. 6=20 C.W.N. 105=30 M.L.J. 73=14 A.L.J. 89=19 M.L.T. 80=3 L.W. 181=23 C.L.J. 137= (1916) M.W.N. 70=18 Bom. L.R. 315=31 I.C. 949=9 Bur. L.T. 8 (P.C.)

in fact have taken steps for a resale after receipt of the defendants' letter of April 21 [on the previous day, the plaintiffs had written a letter to the defendants threatening to resell the goods within time specified on defendant's account and risk unless the plaintiffs heard from the defendants "any within three days from that day." The defendants' letter of the 21st April referred to by His Lordship was a reply to this letter of the plaintiffs and was a refutation of the plaintiffs' averment that the goods were contract goods coupled with a reference to their previous letter of April 5th cancelling the contract] and that the sale should have taken place at any rate by April 19, i. e., after the expiry of the two days mentioned in the notice of April 26. The falling market made it incumbent on them not unduly to delay the sale after the defendants' refusal to accept the goods had become as definite as it did on April 19 and 21.

In these circumstances, it seems to me that the plaintiffs cannot properly take advantage of the fact that the defendants entered into negotiations for a settlement in their solicitors' letters of May 2 and 6. And as the parties have not supplemented the contract by any oral evidence, we can only decide this question of reasonableness on the material provided by the correspondence.

I do not agree with Mr. Coltman that the sale should have taken place within a week after April 5. In view of the unreasonable nature of the defendants' objection to accept the goods, I think some time may probably be allowed for plaintiffs endeavouring to get defendants to reconsider the refusal, but the delay on this account was, I think, unduly prolonged by plaintiffs, contrary to the general principle I have mentioned.

Also some time must of course be allowed for the time taken up in advertising the sale, etc. e. g., a week such as ensued between the plaintiffs' solicitors' letter of May 18, and the actual auction on May 25. To this extent I concur with the lower Court's view that it was not obligatory on plaintiffs to sell at once after April 5, but I think that, in holding that

plaintiffs only waited a reasonable time before selling, the learned Judge has not given due weight to the persistence of the defendants in refusing to take the goods in April, and the consequent duty of the plaintiffs not to delay in re-selling in view of the state of the market.

The result, in my opinion, is that plaintiffs cannot recover the whole loss resulting from resale of May 25, and are thrown back on their remedy of damages on the ordinary basis of the difference between the contract rate and the market rate at the date of breach. This date may be taken to be the day following the defendants' actual refusal in their letter of April 5, i. e., April 6, 1921, as contended in ground 7 of the memo. of appeal.

It is true that in *Prag Narain v. Mul Chant* (2) the measure for damages allowed was the difference between the contract rate and the market rate at the expiration of a reasonable time in which the resale should have taken place. But I agree with the following criticism of this decision in *Hemfry's Sale of Goods in British India* (p. 405): -

"But there seems to be no reason for a departure from the ordinary rule. The right given to the seller includes the right to a reasonable time for effecting a resale, but if he does not exercise the power according to the terms of the section, there is no reason why he should obtain any benefit under it, and the date at which to ascertain the market value."

The Privy Council decision in *Jamal v. Moolta Dawood Sons & Co.* (6) in effect says the same thing as in *Angalia & Co. v. Sissoo & Co.* (7). Farington, J. took the same view, and this Court agreed with him in *Narsingji Manufacturing Co. v. Bulansaleb*. (8)

We, therefore, allow this appeal and declare that the plaintiffs are entitled to recover damages from the defendants on the basis of the difference between the contract rate and the market rate of the goods on April 6, 1921.

Before concluding, I desire to add some remarks regarding the validity of a contract like clause 15 under

(7) [1912] 33 Cal. 565—15 L. C. 705—16 O. W. N. 593.

(8) 1924 Bom. 390.

consideration, and the right of the vendor to recover damages on the special basis therein laid down. Mr. Coltman eventually did not dispute the validity of this right. But as some of his arguments suggested the contrary, and my attention has been drawn to *Narsinggirji Manufacturing Co. v. Budansaheb* (8) which might be held to throw doubt on the right of a seller to recover the stipulated damages under the contract, I wish to give briefly the result of my consideration of the question.

It seems to me clear that there is no ground for doubting the correctness of the view taken in *Moll Schutte & Co v. Luchmi Chand* (9), *Basdeo v. John Smidt* (10) and *Best v. Haji Muhammad Sait* (1), that a contract like clause 15 gives the seller a right to resell the goods and sue for the whole damages mentioned therein. It is a right which has been recognised by the Indian legislature in the form of plaint given in the Civil Procedure Code for plaintiffs suing to recover deficiency upon such a re-sale (see No. 6 of Appendix A to the Civil Procedure Code, 1908). The case there put as to a resale of goods sold at auction is the one that arose in *Lamond v. Davall* (11) which is taken as the basis of the law laid down in S. 48 (4) of the English Sale of Goods Act 1894 (56 & 57 Vic. c. 71). See Benjamin on Sale, 6th Ed., p. 1083. This sub-section runs as follows:—

“Where the seller expressly reserves a right of re-sale in case the buyer should make default; and on the buyer making default, re-sell the goods, the original contract of sale is thereby rescinded, but without prejudice to any claim the seller may have for damages.”

The damages referred to are the same as those recoverable under subsection (3) of S. 48, i.e., the amount of the seller's loss is *prima facie* the difference in the price realised, added to the expenses of the resale. (See Halsbury, Vol. XXV, foot-note (p) on p. 264 and foot-note (t) on p. 265.)

There is, therefore, the clearest authority for the validity of such a clause. It is not affected by *Jamal v. Moola Dawood Sons & Co.* (2) for

the remarks of their lordships at page 501 show that they held that the stipulation giving the seller the option of reselling the share by auction was merely one that he might, if he thought fit, liquidate the damages by ascertaining the value of the shares at the date of the breach by an auction sale as specified. This was obviously based on the provision that the re-sale was to take place at the next meeting of the exchange, i.e., almost immediately on the breach. Consequently their lordships held that there was never any sale by auction under the option and that nothing turned upon this provision as to resale.

In the remarks of the Subordinate Judge which are cited in *Narsinggirji Manufacturing Co. v. Budansaheb*, (8) he takes the view that the authority of *Moll Schutte & Co. v. Luchmi Chand* (9) is shaken by *Angullia & Co. v. Sassoon & Co.* (7). This is clearly erroneous. All that the latter case decides is that, unless the stipulation for a right to resale is so worded as to cover such a case, the right does not extend to goods which have not been ascertained or appropriated for the purposes of the contract. It did not, therefore, cover the case there under consideration which was one of goods in bulk, viz., sugar stored in bags in a warehouse, the particular bags to be delivered never having been selected. But it does not affect the decision in *Moll Schutte & Co. v. Luchmi Chand* (9) so far as it governs a case where the goods have been ascertained and appropriated by the seller to the contract, such as the ten cases of tobacco which were the subject-matter of the contract in that case. Here also the forty-two bales had been ascertained and appropriated to the contract by the sellers: only that appropriation was not assented to by the buyer, so as to make the property in the goods pass to the latter under S. 33 of the Indian Contract Act.

In the judgment in *Narsinggirji Manufacturing Co. v. Budansaheb* (8) Macleod, C.J., says “the provision in the contract with regard to the vendor's power to sell the goods was unnecessary.” With due respect, I think that he overlooks that the provi-

(1) [1898] 25 Cal. 505 = 2 C.W.N. 283.

(10) [1899] 22 A.L. 55 = (1899) A.W.N. 172

(11) [1897] 9 Q.B. 1030 = 16 L.J., K.B., 136 = 11 Jur., 266.

sion (if it gave a right to recover the deficiency on the re-sale and the costs of the re-sale) gave the seller a valid right to more than his ordinary right to re-sell goods, viz., the right to recover damages on the basis mentioned in the contract instead of his right of recovering on the ordinary basis of the difference between the contract rate and the market rate at the date of the breach.

Shah, Ag., C. J.—As we are differing from the learned trial Judge on the principal question of fact, which has to be decided in this appeal, I desire to state my reasons briefly for the conclusion at which we have arrived. The clause as to re-sale in this case gives the plaintiffs the right to sell the goods at any time. The plaintiffs in fact sold the goods on May 25, 1921, and made their present claim on the basis of the difference between the contract price and the price realised at the re-sale. The learned Judge who tried the suit has come to the conclusion that in doing so they acted reasonably, and has allowed the plaintiffs' claim.

In the appeal before us, it has not been contended that such a clause as to re-sale can give the plaintiffs the right to claim the difference between the contract price and the price realised at the re-sale, only if the terms of the clause relating to re-sale are properly observed. In the present case, it is urged that they have not been carried out in so far as the plaintiffs waited beyond reasonable time in effecting the re-sale. It has not been contended in the appeal before us that even if the plaintiffs are found to have acted within reasonable time in effecting the re-sale they would not be entitled to make the claim on the basis on which it is made. There can be no doubt that such a power of re-sale can validly give the seller a right to claim the difference between the contract price and the price realised at the re-sale, provided he has acted within the terms of the clause. Though it may appear from some of the observations in *Narsinggirji Manufacturing Co. v. Budansahab* (8) that such a clause may not have that effect, I do not think that

the point really arose in that case nor do I think it was decided in that sense. In that case the lower Court had dismissed the plaintiffs' suit on the ground that the claim as made in the plaint on the footing of the difference between the contract price and the price realised at the re-sale could not be allowed on the facts of the case and that the plaint could not be amended so as to allow the plaintiffs to claim damages on the basis of the difference between the contract price and the market price. This Court in appeal took the view that even though the plaintiffs' claim as made might not be allowed, it was open to the plaintiffs to claim damages on the footing of the difference between the contract price and the market value of the goods at the date of the breach, apart from the clause as to the re-sale. In fact the decision in *Angullia & Co. v. Sassoon & Co.* (7) was not followed only to the extent that the amendment of the plaint was not considered necessary. But according to the decisions in *Angullia Co. v. Sassoon & Co.* (7) and *Moll Schutte & Co. v. Luchmi Chand* (9) it is clear that the plaintiffs would have a right to claim the difference between the contract price and the price realised at the re-sale, provided they could be proved to have acted in accordance with the terms of the clause.

In the present case the principal point argued is that they have not acted in accordance with the terms of the clause in so far as they have not acted within reasonable time. Though the clause gives the sellers the power to effect a re-sale "at any time", it is clear that the expression must be taken to mean "within reasonable time". That is the view taken by the learned trial Judge, and that view is not contested before us on either side.

Under the circumstances, the only question which has to be decided is whether the plaintiffs acted within reasonable time on the facts of this case. The plaintiffs adduced no evidence, except the correspondence that passed between the parties and their solicitors. It is difficult to say on the correspondence as to when exactly

after the defendants refused to take delivery and broke the contract on April 6, they should have acted. As to the state of the market at that time there is no evidence except such indication as we get from the correspondence. Without precise evidence on that point it is difficult to say whether the plaintiffs should have waited for a week or longer after the defendants communicated their refusal to take delivery of the goods from the plaintiffs. But I am satisfied that at any rate by April 29 the plaintiffs should have certainly taken steps to sell the goods, having regard to the fact that the market was going down, and that it could not be reasonable under the circumstances of the case for the plaintiffs to have waited after that date for effecting a re-sale of the goods. Instead of selling the goods soon after the breach they entered into negotiations with the defendants after the defendants had definitely refused to take delivery on April 5 and had three or four times refused to reconsider the matter in April. The negotiations went on from about May 2 to May 17. But nothing came out of those negotiations, and ultimately the plaintiffs sold the goods on May 25.

According to my view of the correspondence, which has been referred to in detail by my learned brother, there was a definite breach of the contract by the defendants by April 6, and they definitely insisted upon not taking the goods until May 2. During that interval the limit of reasonable time, within which the power of re-sale should have been exercised by the plaintiffs under the clause as to re-sale was exceeded. The subsequent correspondence only discloses negotiations between the parties which broke off on May 17. To that state of facts the decision in *Jamal v. Moola Dawood Sons & Co.* (6) clearly applies. According to the view taken in that case, the only basis upon which, under the circumstances, the plaintiffs would be entitled to damages would be the difference between the contract price and the price of the goods on the date of the breach. I do not read the judgment in that case as casting any doubt upon the proposition, which

has been accepted in several cases to which I have referred, that a clause as to re-sale gives a valid right to the sellers to claim the difference between the contract price and the price realised at the re-sale, provided that power has been exercised in accordance with the provisions of the clause. But where that power has not been exercised within reasonable time, the only right of the sellers is to claim damages on the footing of the difference between the contract price and the market value of the goods on the date of the breach, without any reference to the price which might be realised by a re-sale at any time after the limit of reasonable time has been exceeded. My conclusion is that the defendants committed a breach of the contract on April 5 or 6, that a re-sale should have been effected soon after that—at the latest before the end of April—and that the subsequent negotiations and the subsequent re-sale cannot give the plaintiffs the right to claim damages according to the clause as to re-sale. I, therefore, concur in the order proposed by my learned brother.

Appeal allowed.

★ 1925 BOMBAY 34

SHAH. AG. C. J. AND KINCAID, J.

Hussein Abdul Rehman & Co.—Defendants—Appellants.

v.

Lakmichand Khelsey — Plaintiff—Respondent.

O. C. J. Appeal No. 18 of the 1924, Decided on 1st August 1924 in Suit No. 4431 of the 1923.

(a) *Registration Act, Ss. 77, 72 and 21* Refusal to admit document to registration is covered by S. 72—Suit lies under S. 77 where registrar upholds Sub-registrar's order refusing under S. 21 to accept document for registration on ground of want of sufficient description.

The expression in S. 72 "refusing to admit a document to registration" includes not only a refusal to register but also a refusal to accept a document for registration.

[P 36 C 2]

Where a Sub-Registrar refused under S. 21, Registration Act, to accept a document for registration because it did not contain a description of the property sufficient to identify the same.

Held, the order of refusal was appealable under S. 73 of the Act and that if the registrar on appeal upheld the order, the party aggrieved could institute a suit in the Civil Court, under S. 77 of the Act, for a decree ordering the document to be registered. [P. 37, C. 2]

(b) *Registration Act, S. 21—Description of property as "godown bearing No 3 Port Trust No of which is...in the New Rice Market at Carnac Bunder Port Trust" Bombay was held sufficient, though cadastral survey number of property was omitted.*

Where the material portion of the document was in these terms—We have taken from you on rent a godown bearing No three. The Port Trust Number of which is...in the new Rice Market at Carnac Bunder Port Trust Bombay".

Held, that though the cadastral survey number of the land was omitted, the description was sufficient to identify the property.

[P. 38 C. 2.]

Campbell—for Appellants.

Munshi—for Respondent.

Shah Ag. C. J. This is an appeal from the judgment of M. Justice Fawcett in a suit brought under S. 77 of the Indian Registration Act. The plaintiff filed the suit for an order under S. 77 for registration of the document in question, dated October 18 1922 (Exh. A). It purports to have been executed by Hussein Abdul Rehman & Co. to Lakhmichand Khetsey. The material portion of that document is in these terms:—

"We have taken from you on rent a godown bearing No. three. The Port Trust Number of which is...in the new Rice Market at Carnac Bunder Port Trust Bombay. We have taken the same on rent by fixing the rent thereof at Rs. 601 per month. We are duly to pay you the said rent as accrues due each month. The period in respect of the said godown is fixed to be from the 1st of Kartak Sud and of the Samvat year 1979 to the 30th of Chaitar Vad of the Samvat year 1980 (i. e., from October 21, 1922 to May 3, 1924) i. e., nineteen months including the intercalary month."

Apparently the executant took possession of the godown and remained in possession for some time, but in March 1923 he seems to have given up the idea of retaining it in pursuance of this document. Thereafter the document was presented for registration for the first time on June 7, 1923, after paying the necessary stamp and penalty. The Sub-Registrar on that day made an order refusing registration of the document under S. 20 of the Indian Registration Act. He refused to accept it on the ground that the

endorsement on the document made after it was executed referring to the cadastral survey number was not signed by the executant, but was signed only by the person to whom the document was executed. The reasons for this order are stated in Exh. F which shows that the document was presented by Lakhmichand Khetsey on payment of penalty under S. 25. Lakhmichand Khetsey appealed to the Registrar from this order. The Registrar made the following order on July 26:—

"The order of refusal by the Sub-Registrar is not proper under that section, and I therefore set it aside."

The document came again before the Sub-Registrar who made an order on August 14, 1923, refusing registration of the deed under S. 21 of the Indian Registration Act. In that order also the Sub-Registrar refers to the fact that "the schedule of the property subsequently added is not signed by the executant and has no binding effect on the contract." The said Lakhmichand Khetsey again appealed to the Registrar who made the following order on September 25:—

"In the present case the Sub-Registrar has exercised his discretion given to him by S. 21 of the Registration Act and has refused to accept the lease for registration. I cannot therefore interfere with the order of refusal."

I have taken the substance of these orders from the register kept as required by the Indian Registration Act. The document also is endorsed by the Sub-Registrar on both occasions that "Registration is refused apparently by S. 21 of the Indian Registration Act."

On this refusal of the Registrar to interfere with the order of the Sub-Registrar the present suit was filed on October 26, 1923. The defendants, who are the executants of the document, raised two pleas by way of answer to the suit, first; that the suit was not maintainable as it did not fall within the scope of S. 77 of the Indian Registration Act; and, secondly, that the description of the property was not sufficient to identify it within the meaning of S. 21 of the Indian Registration Act.

The learned trial Judge dealt with the first issue in his judgment dated December 20, 1923, and held that the

suit was maintainable. After that on January 21, 1914, the learned Judge on a consideration of the evidence came to the conclusion on the second question that the description was sufficient to identify the property, and directed registration of the document on the basis of that conclusion.

The defendants have appealed from this decree, and the same two points have been argued in support of this appeal. The first question, therefore, that we have to consider is whether the suit is maintainable under S. 77 of the Indian Registration Act. It is urged that it is not maintainable because under S. 21 what the Sub-Registrar and the Registrar have in effect done is not to have refused registration, but to have refused to accept the document for registration, and that where that is the nature of the order passed by the Sub-Registrar and the Registrar, the suit is not within the scope of S. 77. In support of this contention reliance is placed upon the decision in *Gangava v. Sayava* (1) and the observation of Mr. Justice Chandavarkar in *Abdool Hoosein v. Goolam Hoosein* (2). On behalf of the respondent it is urged that this case does not fall under S. 25, corresponding to S. 24 of the Indian Registration Act of 1877, under which the case of *Gangava v. Sayava* (1) was decided, that for the purposes of S. 77 really there is no difference between refusal to accept for registration and refusal to register a document, that in effect it amounts to a refusal to register the document, and that, therefore, the suit is within the scope of S. 77.

After a consideration of the argument on both sides, we have come to the conclusion that the view taken by the learned trial Judge on this point is perfectly correct. Under S. 77 a party may institute a suit when the Registrar refuses to order the document to be registered under S. 72 or under S. 76. Under S. 76 it is provided that:—

"Every Registrar refusing to direct the registration of a document under S. 72 or S. 75, shall make an order of refusal, and record the reasons for such order."

(1) [1896] 21 B. M. 699

(2) [1905] 30 Bom. 304, = 7 Bom. L. R. 742.

I have omitted to refer to clause (a) in S. 76 because it has no application to the facts of the present case. In order to determine whether the Registrar in this case has refused to direct the registration of this document under S. 72, we must turn to the wording of S. 72 and see whether his order falls under that section. It provides that:—

"Except where the refusal is made on the ground of denial of execution, an appeal shall lie against an order of a Sub-Registrar refusing to admit a document to registration (whether the registration of such document is compulsory or optional) to the Registrar to whom such Sub-Registrar is subordinate."

In the present case the Sub-Registrar refused registration under S. 21. Apparently he did not make the distinction upon which reliance is placed between refusal to accept for registration and refusing to register, at any rate he did not state it, and endorsed the order refusing registration on the document. But whether under S. 21 he refused in fact to accept the document for registration, or refused to register it, it seems to us that the order was appealable under S. 72, because the expression in S. 72 is "refusing to admit a document to registration" which appears to be comprehensive enough to include not only a refusal to register, but a refusal to accept a document for registration. Looking to the words of S. 72 the order was appealable and when the Registrar refused to interfere he in effect refused to direct registration under that section.

Turning to the wording of S. 21 it provides:

"No non-testamentary document relating to immoveable property shall be accepted for registration unless it contains a description of such property sufficient to identify the same."

Then there are provisions in that section as to what kind of description should ordinarily be given with respect to houses in towns and other houses and lands. But from the mere fact that a document is not accepted for registration on account of the objection which in the opinion of the Sub-Registrar exists with reference to the description in a given document, it does not follow that there is no refusal to register the document.

As regards the decision in *Gangava v. Sayava* (1), which was relied upon, it is sufficient to point out that that was a decision, not with reference to an order under S. 21, but in respect of an order which was made under S. 24 of the Act of 1877, corresponding to S. 25 of the present Act. There is no decision which goes the length of accepting the distinction which has been relied upon on behalf of the appellant in respect of an order made under S. 21. The *ratio decidendi* in *Gangava v. Sayava* (1) may lend some support to the contention. But after all it is a decision with reference to S. 24, and does not touch the point in the present case. We do not think that in dealing with the point which arises in this case we are bound by this decision.

As regards S. 25, which no doubt applies to this case, because the document was not presented for registration within four months from the date of its execution, it is enough to refer to the fact mentioned in the first order of the Sub-Registrar that the penalty was paid and the document was accepted. It does not appear on the record of this case whether the document was sent up to the Registrar as required by sub S. (2) of S. 25 for his directions. Having regard to the fact this document has been twice before the Sub-Registrar and twice before the Registrar, it must be taken now that the provisions of S. 25 were duly complied with, and that the necessary direction was given, or must be taken to have been given, and that the document would have been registered but for the objection which the Sub-Registrar thought existed under S. 21 of the Indian Registration Act. It is not disputed before us that the document must be deemed to have been properly accepted under S. 25. That fact itself presents an additional difficulty in the way of the appellant. For instance, if in this case the document has been accepted under S. 25, and subsequently for one reason or another registration is refused, even though the order may purport to have been under S. 21, the net effect is that the registration is refused. In the present case, we are quite satisfied that

the registration was refused under S. 21, that the order made by the Sub-Registrar was appealable under S. 72, and that when the Registrar refused to interfere with that order, he in effect refused to direct the registration of the document within the meaning of S. 76 (1) (b), and that the suit is maintainable under S. 77.

The second point as to whether the document contained sufficient description for the purpose of identifying the property is really a question to be determined with reference to the nature and terms of the document and the circumstances of each case. It is not in my opinion, desirable, nor is it necessary to attempt to define what may be sufficient and what may not be sufficient description of the property. In the present case we have the fact that it is a "go-down" which was let to the appellant. It was let for a period of nineteen months and the document contains not a very full description, but an apparently sufficient description. It appears from the order passed by the Sub-Registrar, as also from his evidence that he refused registration because the endorsement referring to the cadastral survey number of the land on which this godown was constructed was not signed by the executants. So far the position is perfectly correct. That endorsement is of no use as it is not signed by the executants in determining whether the document contains a sufficient description of the property or not. But the Sub-Registrar seems to have assumed that if the land on which the godown stood was not described by its cadastral survey number the description could not be sufficient within the meaning of S. 21. On that point the terms of Ss. 21 and 22 afford a complete answer. sub-S. (2) of S. 21, with which we are concerned, provides that:—

"Houses in towns shall be described on the north or other side of the street or road (which should be specified) to which they front and by their existing and former occupancies and by their numbers if the houses in such street or road are numbered."

Sub-S. (3) of that section relates to other houses and lands, and the essential requirement of S. 21, is given in sub-S. (1), namely, that the document

must contain a description of the property sufficient to identify the same. S. 22 provides that:—

"Where it is, in the opinion of the Local Government, practicable to describe houses, not being houses in towns, and lands by reference to a Government map or survey, the Local Government may, by rule made under this Act require that such houses and lands as aforesaid shall, for the purpose of S. 21, be so described."

It may be mentioned that the Local Government have made rules under this sub-section which are to be found in the Bombay Government Gazette, Part I, 1910 (Notification No. 6412 of July 18, 1910 p. 1065. The Sub-section itself provides, and the rules clearly indicate, that they are applicable to houses not in towns and lands, and it is conceded before us that the rules made by the Local Government under sub-S. (1) of S. 22 cannot apply to this property, because it is a house in a town with reference to which under sub S. 1 of S. 22 Government have no power to make rules, and in reference to which no rules have been made. It may be that for the purpose of indexing the property as required by the Indian Registration Act it is desirable, and even necessary to a certain extent, that the cadastral survey numbers of the land on which any particular house stands in the town should be stated in the document. But the provisions of law are clear, and there is no requirement of law that such numbers should be stated in describing houses in towns. Sub-S. (2) of S. 22 provides as follows:—

"Save as otherwise provided by any rule made under sub-S. 1), failure to comply with the provisions of S. 21, sub-S. (2) or sub S. (3), shall not disentitle a document to be registered if the description of the property to which it relates is sufficient to identify that property."

Therefore the whole question is whether the description given in this document, apart from the endorsement on this document, which must be left out of account, is sufficient to identify the property: The nature of the property here, as the learned Judge has rightly held, is that it is a superstructure on land, and that the document makes no reference to the land itself. The question is whether the description given in the document is sufficient to identify that superstructure. The learned trial Judge has drawn a distinction

between houses and buildings which may or may not be justified for the purposes of sub-S. (2) of S. 21. We do not consider it necessary to follow that distinction for the purposes of this case. Treating the superstructure to be a house within the meaning of S. 21, the question is whether the house is sufficiently described. Both parties before us have argued the case on the footing that the godown is a house within the meaning of S. 21, and we are prepared to accept that position so far as the decision in this case is concerned. Taking the godown to be a house, the description in the document, such as it is, appears to be sufficient. The learned Judge, after a careful consideration of the circumstances of the case came, to the conclusion that it was sufficient to identify the property, and we accept that conclusion.

The result, therefore, is that both contentions urged in support of this appeal fail. We confirm the decree of the trial Court and dismiss the appeal with costs. We discharge the stay order.

Appeal dismissed.

★ 1925 BOMBAY 38

COYAJEE AND FAWCETT, JJ.

Bai Suraj widow of Bhavsang Dadabhai—Plaintiff—Appellant.

v

Jijibhai Bhavsang and another—Defendants—Respondents.

Appeal from Original Decree No. 186 of 1921, Decided on 9th July, 1923, against the decision of Sub. J., Broach in Suit No. 387 of 1919.

★(a) *Hindu Law*—Will—Devise in favour of wife—Grant of absolute ownership is enough and no express words granting power of alienation specifically are necessary to entitle the wife to transfer.

The view that under the Hindu Law, in the case of immovable property given or devised by a husband to his wife, the wife has no power to alienate unless the power of alienation is conferred upon her in express terms is not sound. If words are used conferring absolute ownership upon the wife, she enjoys the right of ownership without their being conferred by express or additional terms, unless the circumstances or the context are sufficient to show that such absolute ownership was not intended. [P. 42 C. 1]

* (b) *Hindu Law—Alienation by widow—Legal necessity—Payment of husband's debt and performance of his obsequial ceremonies are a legal necessity.*

Sale of immoveable property for the purpose of payment of the debt left by the widow's husband and the performance of his obsequial ceremonies is valid as being made for legal necessity. [P 42, C 2]

(c) *Deed — Construction — A Hindu's will devising his entire property to his wife with powers of alienation in case of necessity was held not to curtail her powers to legal necessity, the reference to necessity being held as only the ordinary aversion of an owner to alienate save when necessary.*

Where the will devising the whole of the property to the testator's wife, stated, "I fully empower B (wife) to deal with my property if it becomes necessary to do so in any manner she may deem proper, by way of effecting a mortgage, sale, charity, etc."

Held: (Per Fawcett, J.): The words "if it becomes necessary to do so" cannot properly be read as restricting the widow's power of alienation to legal necessity under Hindu Law. They are intended to bar alienations for which there are no reasonable grounds and are based on the ordinary aversion of an owner to alienate unless it is necessary to do so. [P 43, C 2]

G. N. Thakor with R. J. Thakor — for Appellant.

K. N. Koyaji—for Respondents.

Coyajee, J.—This appeal arises out of a suit brought by plaintiff Bai Suraj (now appellant) to redeem a mortgage (Ex. 20) effected by her husband Bhavsang Dalabhai and one Rahakuver in favour of Bhavsang Adesang in the year 1885. For purposes of this litigation Rahakuver's interest in the mortgaged property may be taken as negligible.

Bhavsang Dalabhai died on the 30th December 1908 leaving no issue. His widows Bai Man and Bai Suraj survived him. On June 4th, 1908 Bhavsang made a will (Ex. 21) in the Gujarati language, and got it duly registered. The translation supplied to us is accepted by the parties to be correct. The material provisions of the will are: "I direct that after my death the whole of my immoveable and moveable property described (herein) below shall be given to my said wife Man. My new wife named Suraj has not at all won my affection until now and has like-wise taken no part whatever in serving and attending upon me.....Therefore by reason of her such actions (conduct) I

am altogether displeased with her. Consequently after my death she should not get any portion whatever of my property. Notwithstanding this, I am moved with compassion for her.....I direct that after my death my wife, the said Bai Man, shall every year on the 1st day of Kartak Sudh pay to the said Bai Suraj during her life-time Rs. 50.....During my life-time I am the owner of the abovementioned immoveable property, and besides the same, the ornaments and things etc., the moveable and immoveable properties; and as to such of the properties as may remain after my death Bai Man shall take the same into her possession and shall herself carry on the *vahivat* (management) thereof. And I fully empower Bai Man to deal with any property if it becomes necessary to do so, in any manner she may deem proper by way of (effecting) a mortgage, sale, charity etc.....If I be unable during my life-time to redeem such of the above-mentioned properties as may have been mortgaged, then in that case I empower Bai Man after my death to redeem and take possession of the same in any way she may like. This right of redeeming after my death is not vested in any other person except Bai Man.....Over and above the properties described above, as to my other properties which there may be, Bai Man is the owner of the whole of the said immoveable and moveable properties. She is (Owner) after my death. As to the above described immoveable properties.....And besides the same as to all the moveable properties that there are at present and the new dues that there will be hereafter. I am during my life-time the owner of the same and after my death as to the properties that may remain Bai Man is the owner thereof." The testator directed Bai Man to perform after his death all funeral rites and ceremonies in a manner befitting his rank and social position.

On January 4th, 1909 Bai Man sold and conveyed the property involved in this suit to defendant No. 2 (now respondent No. 2) who is the grandson of the original mortgagee Bhavsang Adesang. The consideration is

recited in the sale-deed (Ex. 55) to be Rs. 6695/- due on the usufructuary mortgage, Ex. 20, and a further sum of Rs. 2499 - "taken in cash for performing the obsequies of my deceased husband Raj Bhavsang Dalabhai and for my maintenance."

Bai Man died in 1916, and on December 18th, 1919, Bai Suraj brought this suit against defendants 1 and 2 who are respectively the son and grandson of the original mortgagee, to redeem the mortgage, Ex. 20. She alleged that on Bai Man's death she became the sole owner of the right to redeem; that the said alienation by Bai Man was not binding upon her; that Bai Man had no authority to make the alienation, that she had received no consideration for it, and that it was not justified by legal necessity. She also produced and relied upon a document (Ex. 35) purporting to be a will made by her husband on December 25th, 1908. The effect of this document is to revoke the earlier will in favour of Bai Man, and to confer a life interest on each of the two wives in certain specified properties.

The material issues before the Trial Court were:—The 1st. "Is it proved by the plaintiff that the deceased Bhavsang Dala made the will dated 25th December, 1908 cancelling first the will dated 4th June, 1908?" and the 3rd. "Whether defendant 2 proves the sale deed dated 4th January 1909, and is it valid and operative at law?" The learned Judge, on a careful consideration of the evidence adduced in the case, came to the conclusion, as to the first issue, that the alleged will was not proved; in his opinion it was a fabricated document. On the 3rd issue he held that the sale deed Ex. 55 was valid, the consideration recited therein was paid, and the sale was justified by legal necessity. He therefore dismissed the suit.

Against the decree Bai Suraj has brought this appeal. The first and main question discussed before us was whether the lower Court had erred in holding that the document Ex. 35 was not duly executed by Bhavsang. This document purports to bear the attestations of eleven

persons including that of the writer Dhanji. Four of these persons are said to have died since its execution. Of the seven survivors, three have been examined as witnesses, Exs. 34, (the writer), 47 and 48. This evidence which was disbelieved by the lower Court, has been very fully discussed before us. I agree with the learned Judge in holding that it is not proved that Ex. 35 was executed by Bhavsang; in my opinion Ex. 35 is a suspicious document. It is material to note that Bhavsang had not requisitioned the services either of Dhanji or of any of the ten persons who are said to have attested Ex. 35, when he executed his first will Ex. 21, the genuineness of which is not disputed. Dhanji (Ex. 34) admits that he is not a professional writer; that he was not a friend of Bhavsang; that he had not written any other document for Bhavsang; and that he gets his own valuable documents written by other persons. Witness Raising (Ex. 47) is plaintiff's nephew. Neither his evidence, nor that of Bapubhai (Ex. 48) is such as to inspire confidence. I see no reason to reject the lower Court's estimate of this evidence. The learned Judge, moreover has compared the alleged signature of Bhavsang on Ex. 35 with his genuine signatures on Ex. 21, and in his opinion "a deliberate attempt is made to put the signature of Bhavsang Dala" on Ex. 35. I have also made a similar comparison. I should, however, prefer not to hazard a definite opinion on the point; for, as a mode of proof mere comparison of handwriting is inconclusive. But it does seem to me that the signature to Ex. 35 is a laboured one, and the formation of some of the letters (more particularly ण द ण) occurring in the signature is different from the formation of the same letters in the genuine signatures. I have read both the documents, Ex. 21 and Ex. 35. The tone of the letter is throughout apologetic. No acceptable story is placed before the Court to explain why Bhavsang so completely undid in December what he had deliberately done in the preceding June. And it is permissible to expect that if he

had really changed his mind, he would either have destroyed the first will, or at any rate got the later will also duly registered.

It has however, been contended on behalf of the appellant that this document Ex. 35 was referred to in certain documents as early as in the year 1907, and that that fact renders its genuineness highly probable. Reliance was placed on a notice given on January 22nd, 1909 by Plaintiff to Bai Man and others, and on certain Farkhats (Releases) said to have been executed by the two ladies in or about June 1909. As for the notice, Ex 39, Bai Man in her reply (Ex. 40) dated January. 29, 1909, denounced the statements made therein as false, and asserted that "Bhavsang Dalabhai on the date the 4th of June in the year 1908 made a registered will for my benefit and declared me to be the owner of his entire immoveable and moveable properties." That will had deprived his agnates of all hope of succeeding to his estate. The effect of the document Ex. 35 and the Farkhats was to rehabilitate them. There is some evidence in the case that no good feeling existed between them and Bhavsang. There was sufficient interval of time between the 4th of June 1908 and the 22nd of January 1909 for the fabrication of Ex. 35, if indeed one was minded to do so. The fact, therefore, that it is referred to in the notice Ex. 39 does not establish its genuineness; it only makes its genuineness probable.

The same remark applies to the Farkhats. But the original Farkhats are not forthcoming, and evidence as to the circumstances in which they were executed is wanting. Bai Suraj says in her examination-in-chief (Ex. 36); "Farkhat was not made. I did not go to the Registry office. Madhavsang Daji got the release. I do not remember whether I signed the Farkhat. I do not admit the true character of the Farkhat. Madhavsang might have got the Farkhat for Man. R. B. Malji read out the Farkhat." The Farkhat said to have been executed by Bai Man in Plaintiff's favour is not put in, even though it was called

for in the lower court, for the earned Judge observes; "I asked in vain about the original Farkhat but some good sense prevailed in not producing it in court as its genuineness is open to grave doubts." And he adds that it is not proved that effect was given to the Farkhats. The defendants, however, clearly referred to the Farkhat in their written statement; and they produced and put in a certified copy (Ex. 22) of one of these Farkhats. It is clear therefore that some attempt was made in or about June 1909 either to bring about a settlement of the differences existing between the two widows, or to create evidence in support of the document purporting to be the later will of Bhavsang. Bai Man being dead, her evidence is not available. Plaintiff professes not to know anything about it. In these circumstances it is not possible to ascertain the whole truth about these Farkhats. The only importance, however, which I can attach to them is that they make the genuineness of Ex. 35 probable; and I have taken that fact into consideration. It was also urged on plaintiff's behalf that she had been in possession of a considerable portion of her husband's estate, a circumstance inconsistent with Ex. 21 and consistent with Ex. 35. But here also the evidence is both meagre and indecisive.

I therefore agree with the Trial Court in holding that the alleged latter will is not proved.

The burden however still lies on the 2nd defendant to establish those facts which would justify the alienation under which he claims. The sale (Ex. 55) was made not jointly by the two widows, but by Bai Man alone. It is neither alleged nor proved that Bai Suraj had consented to it. The alienation therefore is not binding upon her. "On the principle of joint tenancy with survivorship, no alienation by one widow even though she is the Manager at the time, can have any validity against the rights of the others without their consent, or an established necessity arising in circumstances which rendered it impossible to seek

for consent." (Mayne, Hindu Law and Usage, 9th Edition Section 554. See also *Bhugwanleen v. Myna Bae* (1) *Sri Gajapati Radhamoni vs. Pusapati* (2). The alienee, however, relies on the provisions of the will Ex. 21 as justifying the alienation. In my opinion, the provisions of that will—they are set out above—confer an absolute ownership of the estate upon Bai Man. It must now be taken as settled that the view that under the Hindu law, in the case of immoveable property given or devised by a husband to his wife, the wife has no power to alienate unless the power of alienation is conferred upon her in express terms is not sound. If words are used conferring absolute ownership upon the wife, the wife enjoys the rights of ownership without their being conferred by express and additional terms, unless the circumstances or the context are sufficient to show that such absolute ownership was not intended *Bhaidas Shivdas v. Bai Gulab* (3). In this case neither the context nor the circumstances are sufficient to show that absolute ownership was not intended to be conferred. The provision that "I fully empower Bai Man to deal with any property if it becomes necessary to do so, in any manner she may deem proper by way of effecting a mortgage, sale, charity etc.," rather emphasises but does not curtail the grant of absolute ownership. The insertion of this provision expressly conferring on Bai Man a power of alienation can be explained on the ground that it may well have been that whoever drew the will held the view that words of absolute gift in favour of a Hindu widow were not sufficient in themselves to confer a power of alienation also (see *Bhaidas* case (3). Here we have a power expressly conferred. The case is thus distinguishable from that of *Jamnadas*

v. Ramautar Pandey (4) where the material provision in the will was expressed in these words:—"In case of proper necessity she, as my representative, is at liberty in every respect to transfer the property by sale or mortgage." Those words clearly restricted the donee's power of alienation and confined it to "proper necessity." The language used by Bhavsang was entirely different; in my opinion he intended to confer on Bai Man an alienable interest in the property; her power to alienate was not limited to necessary purposes. In this case, moreover, the Subordinate Judge was satisfied upon the evidence adduced on behalf of the alienee, that the sale in his favour was made to meet a valid necessity. Bhavsang does not appear to have possessed much available cash at any time. In 1894 he raised the sum of Rs. 5799 by mortgaging other properties; he was not able to satisfy the debts until 1906; and even then he was only able to do it by selling the property to the mortgagee himself. A redemption decree obtained by him in July 1907 with reference to another property remained unsatisfied at his death. He died in December 1908 leaving the mortgage now under consideration unredeemed. It is proved by witnesses on both sides that after his death Bai Man performed the necessary funeral rites and ceremonies in a manner befitting his rank and social position as he had directed her to do. To satisfy her husband's debt, and in order to be able to perform those ceremonies, she sold the property in suit to defendant No. 2, five days after Bhavsang's death. It is so recited in the sale-deed (Ex. 55) and the truth of that recital is established by evidence. The sale was conducted openly; for plaintiff says that she was invited to sign the conveyance (Ex. 36). The payment of consideration is proved by witnesses who according to the Judge who had seen them were "respectable persons," and whom he believes. The learned Judge has given sufficient reasons for holding that there was legal necessity for the alie-

(1) [1866-67] 41 M. 1 A. 487=9 W. R. P. C. 23=2 Suther 124=2 Sar. 327 (P. C.)

(2) [1892] 19 L. A. 184=16 Mad. 1=6 Sar. 1 (P. C.)

(3) 1922 P. C. 193=46 Bom. 153=49 L. A. 1=24 Bom. L. R. 551=20 A. L. J. 289=35 C. L. J. 314=26 C. W. N. 129=15 M. L. W. 412=42 M. L. J. 385=30 M. L. T. 149 (P. C.)

(4) [1905] 27 All. 364=(1904) 2 A. W. N. 278=1 A. L. J. 709.

nation, and that consideration was paid for it. I agree with his reasons and conclusions, and would add that the fact is not without its significance that plaintiff remained acquiescent for nearly, twelve years, although she knew of the transaction when it was carried out.

For these reasons, I would confirm the decree and dismiss the appeal with costs.

Fawcett, J.—I concur in dismissing the appeal with costs for the reasons given in the judgment just delivered by my learned brother.

I would only add a few remarks. I think the contents of the alleged will (Ex. 45) clearly point to its being a got up document, in the absence of any adequate explanation for the testator's so soon changing his intentions in this way. It is extremely unlikely, for instance, that, after executing a registered deed of gift in favour of the girl Bai Girja, whom he had brought up from infancy, he would, just 6 months later, try to nullify that gift, in the way Ex. 35 does. No reason is even suggested for his wanting to divest Bai Girja of what he had given her; and the plaintiff, Bai Suraj, admits in her deposition that Bai Girja, and after her death her son Mohan continued in possession of the land and house that had been gifted to her.

The provision in Ex. 35 for Bai Man getting more property than Bai Suraj was no doubt inserted, in an attempt to avoid suspicion.

The recitals in the Farkhat passed by Bai Suraj to Bai Man (Ex. 22) as to the execution of the later will by the deceased are really admissions in favour of the maker of them, which are inadmissible in evidence under S. 21 of the Evidence Act. The corresponding Farkhat alleged to have been passed by Bai Man was not produced in the lower Court, though the Subordinate Judge says he pressed for its production. Though it was produced by the pleader for the appellant at the hearing of the appeal, no sufficient reason appears for our allowing it to be now put in evidence under Order 41, rule 27, Civil Procedure Code. But, even assuming that it contains similar recitals as to this

will, I do not think (in view of Bai Man's reply to plaintiff's notice, Ex. 40) that such recitals could be treated as a genuine admission by her of the authenticity of the will. In compromise, or attempted compromise of that kind, each side naturally sets forth its case, without its following that the opponent admits the truth of it.

I concur with my learned Colleague in thinking that the will Ex. 21 conferred an absolute estate on Bai Man, with full powers of alienation, I do not think the words "if it becomes necessary to do so" can properly be read as restricting this power to the case of "legal necessity" under Hindu law. That is opposed to the use of the word "fully" "empower," and to the consideration that the entire clause would be unnecessary, if that was the testator's real intention. Again the use of the word "charity" indicates that the testator intended even to allow a gift of immoveable property by way of charity, a case which does not fall under the ordinary powers of a Hindu widow to alienate for legal necessity. This also differentiates the case from that at 27 All. 364, which (besides qualifying the word "(necessity)") gave only a power to sell or mortgage. The words "if it becomes necessary to do so," in my opinion, were merely intended to bar alienations for which there are no reasonable grounds. They are based on the ordinary aversion of an owner to alienate, unless it is necessary to do so.

In any case, I agree with the finding of the lower Court that there was 'legal necessity' in the present case. The deceased's will shows his anxiety to have his funeral ceremonies properly performed, and I entirely concur with what my learned brother says on this point.

Appeal dismissed.

1925 BOMBAY 44

MACLEOD, C. J., AND SHAH, J.

Ganpati Gopal Risbud—Plaintiff—Appellant.

v.

Secretary of State—Defendant—Respondent.

F. A. No. 434 of 1920, Decided on 1st April, 1924, from the decision of Joint Judge, Thana, in Civil Suit No. 14 of 1916.

Khot—Terms of Kabuliati to Government must conform to custom except as altered by Bombay Act I of 1865, Ss. 37 and 38.

A Khot's interest in the khoti village is limited, not absolute. He possesses in some measure a proprietary right. He is an occupant with all rights and liabilities affecting such a status. The Khot has to secure to Government the payment of the village revenue, while the village lands which he has to manage in accordance with the restrictions mentioned in the kabuliati fall under three distinct items, viz.—(1) Dharekari lands the tenants of which have a transferable and heritable right paying Dhara alone to the Khot, (2) Khot nisbat lands which are in the hands of permanent occupancy tenants or tenants with less permanent right paying Fayda to the Khot and the Government assessment and (3) Khoti Khasgi lands, private lands in the possession of the Khot of which he can make such use as he pleases. With regard to Khot nisbat lands the right of the Khot to exact rent or Fayda in addition to the assessment is limited by the Kabuliati which is in accordance with the decision of the Government Officer, fixing the demand of the Khot on his tenants under S. 38, Bombay Act I of 1865. [P. 45, C. 2, P. 46, C. 2.]

Khots in the district of Kolaba are hereditary farmers of the revenue and are entitled to hold their villages as Khoti on their entering every year into the customary Kabuliatis. [P. 46, C. 1.]

If the Government wish to impose upon the Khot a new form of Kabuliati they must not infringe the customary rights of the Khots except as altered by S. 38 of Bombay Act I of 1865.

A Khot of a village in the Kolaba District, at first used to pass annual Kabuliatis to Government in the form which was then in use. Government offered, in 1915-16 to the plaintiff, a Kabuliati in another form which contained several new clauses. Clause 6 empowered a permanent tenant of Khot nisbat land to compel the Khot either to consent to a transfer or to take up the land himself. Clause 8 required the Khot to keep the land at the disposal of a Dharekari who had deserted. Clause 21 worded ambiguously. As the Khot objected to pass the Kabuliati in the new form the Government attached the Khoti village.

Held:—That the Khot was justified in refusing to sign a Kabuliati which contained any one of such objectionable clauses, viz. 6 and 8

which were in infringement of the customary right of the Khot and that the attachment of the village for refusing such a Kabuliati was, therefore, illegal and the Khot was entitled to mesne profits and damages. [P. 47, C. 2.]

K. H. Kelkar and P. A. Bhat—for Appellant.

H. C. Koyajee with S. S. Patkar, Govt. Pleader—for Respondent.

Macleod, C. J.—The plaintiff in this suit is the hereditary Khot of Maluka in the Taluka of Mangaon in the District of Kolaba. From the year 1865 until 1914 the Khot of this village signed in each year a Kabuliati in favour of Government in a particular form. In 1915 the Government presented a new form of Kabuliati for the Khot's signature, and on his refusing to sign, the village was attached thus necessitating the filing of this suit in which the plaintiff prayed as follows:—

A (1) The plaintiff in the capacity as a Khot has a permanent right of holding the village, of making recoveries in accordance with the Manual practice and of management. It is neither necessary nor lawful to compel him to pass a Kabuliati of any description whatever.

(2) The condition objected to in the statement hereto annexed cannot be asked for in writing in the Kabuliati.

(3) The attachment of the Khoti village effected because the plaintiff did not pass a Kabuliati in writing as asked for by the defendant for the year 1915-1916 is not legal and the Government have no right to make recoveries from any of the cultivators of Khot nisbat lands.

B An order should be passed as mentioned in sub-clauses 1, 2 and 3 of clause A and the defendant should be restrained by a permanent injunction from acting to the contrary.

C. The plaintiff's damages of Rs. 317 2-8 for the year 1915-1916 and interest thereon at 10-12-0 per mensem till receipt should be ordered to be paid by the defendant and all kind of future mesne profits due should be ordered to be paid by the Government.

The defendant in his written statement denied that the plaintiff had a permanent right to hold the village. He contended that the plaintiff was a farmer of the revenue and the continuance of his holding depended upon his executing and observing such agreement as defendant might from time to time require him to accept, and upon his obeying such orders as defendant might pass with a view to the good administration of the village and in the interests of the community.

The main point of difference between the parties was that the plaintiff contended that he was not obliged to sign any form of Kabulayat at all, while the defendant contended that the plaintiff was bound to agree to any Kabulayat which the defendant might require him to sign.

The various issues raised on the pleadings appear at page 6 of the print but for the purpose of the judgment it will only be necessary to refer to issue three.

It should have been perfectly obvious to both parties that each was contending for more than he would be able to prove. The result has been that the record has been burdened with a vast number of documents which would otherwise have been irrelevant and the learned Judge in a most exhaustive judgment felt himself compelled to relate once more the whole history and the incidents of the Khoti tenure. This case bears a curious resemblance to the Ambdoshi case in which the Appeal Court decision is reported in 30 Bom. 290.

The plaintiff asserted a right to revert to the Mamul Vahiwat in 1892 on the expiry of the period of the settlement and as the learned Judges of the Appeal Court remarked that that question depended entirely on the construction of Ss. 37 and 38 of Act I of 1865 and Ss. 102-106 of the Bombay Land Revenue Code, and while expressing their admiration of the diligence and ability of Mr. Tipnis in his judgment of over seventy printed pages, confined themselves to considering whether the plaintiff's claim to be entitled to revert to the Mamul Vahiwat was justified on a proper construction of those sections.

In the appeal before us Mr. Kelkar has accepted the findings of fact by Mr. Saldanha and has confined his arguments to the question arising on the third issue dealing with the main contention referred to above, which ran as follows:—

"If the plaintiff is bound to pass a Kabulayat, what should be its terms at present? What modifications, if any, should be made in the clauses of the Kabulayat set out in the Appendix to the plaint?"

The answer given by the Judge was that the Kabulayat finally sanctioned by Government was found

unobjectionable provided there were added such exact definitions of technical terms and more explicit language was used as appeared desirable in the light of the judgment of the Court. The result of the finding on that issue apart from all other questions was that the plaintiff's suit was dismissed, each party to bear his own costs.

The plaintiff has appealed and certain cross-objections are filed by the defendant. But the attitude of the plaintiff is now under the advice of his pleader far different from that which was taken in the plaint and persisted in throughout the proceedings in the lower Court. Mr. Kelkar, on behalf of his client, is agreeable to obtain a declaration that the plaintiff is a permanent hereditary farmer of the village of Maluk the hereditary right being dependent on his passing a Kabulayat every year containing under orders of Government with a view to the better administration of the Khoti village.

It follows that the only question we have to determine in this appeal is whether the Kabulayat presented by the Government in the year 1915-16 was one which the Khot was bound to accept. In order to determine that question we have to remember that this Khoti tenure is a customary tenure which dates back from the time of the 18th century or earlier, and that its incidents as prescribed by custom are nowhere defined and differ in different villages. We are not aware of the origin of the tenure but it was probably due to the difficulty experienced by the Government of the time in collecting the revenues of the villages in the Konkan. Consequently the Government entered into agreement with certain persons that they should collect the revenue, but to what terms the original farmers agreed, we are not aware except that the agreement was to be according to the custom of the country. When the British Government took possession of the Konkan about the year 1818, agreements were entered into between the Government and the farmers or Khots with regard to the payment of the assessment by the Khot to the Government. At first

the agreements merely stated that the Khot was responsible for the assessment since the main object of the Government was to secure for themselves the land revenue of the village. Later on in order to provide for the due administration of the village and to protect the tenants against the exactions of the Khots, it was found necessary to amplify the terms of the agreement but the fact remained that it became an established custom for each Khot to enter into an annual agreement with Government. In 1865 Bombay Act I of 1865 was passed. That Act provided for the survey, demarcation, assessment and administration of lands held under Government in the districts belonging to the Bombay presidency, and thereafter this particular village was brought under the new revenue survey. s. 37 and 38 of the Act were particularly applicable to Khoti villages. S. 37 directed that whenever in the Ratnagiri Collectorate and certain Talukas in the Thana Collectorate the Survey Settlement was introduced into the villages or estates held by Khots, it should be competent for the Superintendent of Survey or Settlement Officer, with the sanction of the Governor in Council, to grant the Khot a lease for the full period for which the Settlement might be guaranteed, in place of the annual agreements under which such villages had hitherto been held, and, further, the provisions of S. 36 in respect to the right of permanent occupancy at the expiration of a settlement lease should hold good in regard to those villages or estates.

S. 38 said :

"It shall also be competent to such officer, with the sanction of the Governor in Council, to fix the demands of the Khot on the tenant at the time of the general survey of a district, and the terms thus fixed shall hold good for the period for which the settlement may be sanctioned."

But this limitation of demand on the tenant shall not confer on him any right of transfer by sale, mortgage or otherwise, where such did not exist before, and shall not affect the right of the Khot to the reversion of all lands resigned by his tenant during the currency of the general lease."

No lease was granted by Government under S. 37 to the Khot of Maluka, but thereafter the annual

Kabulayat which was signed by the Khot defined exactly the demands which the Khot could make against his tenants. It will be sufficient for me to say that the lands in the village are either Dharekari or non-Dharekari. Dharekari lands are in the occupation of tenants having permanent heritable and transferable rights paying to the Khot the Government assessment only. Non-Dharekari lands are generally spoken of as Khoti lands which are either Khot-nisbat or Khoti-khasgi. Khot-nisbat lands may be held by permanent tenants who have hereditary but not transferable rights, or by non-permanent tenants, all of whom pay to the Khot in addition to the assessment Fayda which is fixed according to the terms of the Kabulayat. Khoti-khasgi lands are the private property of the Khot either by being entered in his name in the original survey, or by acquisition since the survey by purchase or other lawful transfer otherwise than in his capacity as Khot, or by being brought into cultivation at the Khot's own expense though entered in the original survey in the Khot nisbat Khata. It is important to note that with regard to those lands which came within the description of Khot-Nisbat land the right of the Khot to exact rent or Fayda in addition to the assessment was limited by the Kabulayat which was in accordance with the decision of the Government Officer fixing the demand of the Khot on his tenants under S. 38 of Act I of 1865. Therefore on the one hand the Government secured to themselves the payment of Juma by the Khot according to the amount fixed in the Kabulayat for the Khot was liable to pay that amount whether he could collect it from his tenants or not. On the other hand the tenants were protected from the demands of the Khot by the restrictions placed upon him by the terms of his Kabulayat. Prior to 1865 these demands were fixed by custom which varied in different villages with the result that the custom being variable complaints were common amongst the tenants that exactions were levied which were not sanctioned by custom.

On the other hand the Khots complained that the tenure of the Mamul Vahiwat had been unduly restricted by the operation of S. 38 of Act 1 of 1865. But in my opinion the Kabulayat which Government asked the Khots to sign was bound to conform to custom except as altered by that section and subject to that condition the Khot would be obliged to sign the Kabulayat. If the Government presented a new form of Kabulayat which contained terms not prescribed by custom or by Statute, then the Khot might refuse to sign, and it would depend upon the decision of a higher authority whether such refusal was justified or not. Consequently the only point in this case which it is necessary for this Court to decide is whether the plaintiff Khot was justified in refusing to sign the Kabulayat of 1915-16. It appears to me very clearly that clauses 6 and 8 of the new Kabulayat do not conform to established custom, are not justified by S. 38 of Act I of 1865, and restrict the rights of the Khot in a manner which is not permissible. I may also draw attention to clause 21 which as far as I can gather first deprives the Khot of any right to claim compensation or to make any demand in the case of Khot nisbat lands which may be acquired under the Land Acquisition Act for public purposes, though the latter half of the clause might appear to allow him compensation in such a case if he could prove the loss of any rent or profit to which he would have been entitled by reason of a vested right but for the acquisition. In any event it would not be safe for the Khot to accept a clause drawn in such an ambiguous form. Clause 6 is extraordinarily badly worded but, apart from that, according to its terms a customary tenant of Khoti land who could not transfer without the consent of the Khot, provided he had made improvements and prepared the land at his own costs was empowered to compel the Khot either to consent to a transfer or to take up the land himself after paying the amount paid for improvements and preparation. That clause is a distinct infringement of the customary right

of the Khot. It has been established by custom that a permanent tenant of Khot-nisbat land cannot transfer without the consent of the Khot. The Khot was asked to agree to a condition that once such a tenant had improved his land, he would be entitled to ask the Khot to consent to the transfer and in the case of the Khot's refusal to compel him to pay up the amount spent on the land and take up the land. We think the introduction of that clause alone justified the Khot in refusing to sign the Kabulayat.

Then under clause 8 in the case of desertion of his land by Dharekari, the Khot was asked to agree that however long the desertion might be, he could keep the land at his disposal and in case the Dharekari returned restore it to him. In the case of desertions of land by occupancy tenants the Khot was asked to agree that he should restore such land to the occupant if he returned within twelve years. The result of that clause being accepted would be that in the case of deserted lands the Khot would be unable to arrange for their proper cultivation by the tenants. He would have constant difficulties, as in the case of Dhara land the Dharekari would always be able to return at any time and demand back the land, and with regard to occupancy lands until the expiry of twelve years the occupant would still be entitled to demand back the land. That clause again in my opinion infringes the customary right of the Khot, and its inclusion in the Kabulayat justified the Khot in refusing to sign. The corresponding clause in the old Kabulayat stated that in the case of a Dharekari or a tenant of Khot-nisbat land absconding or dying without leaving an heir the Khot should make a report to the Mamlatdar and then await the passing of orders in regard to the taking of steps for the cultivation of such land and in regard to the payment of fixed assessment to Government.

Much has been said about clause 16 in the old Kabulayat which has a very curious history. It runs as follows:—Clause 16: Litigation is at present going on in the High Court

regarding Khoti rights, decision will be given there, a Vahiwat should be introduced in accordance therewith in our villages. Until then it has been agreed that the terms mentioned in the clauses 1 to 15 will be observed". The case referred to there is what was known as the Ambegaon case in which the suit was filed in 1867, was decided by the lower Court in 1869, and eventually terminated in the High Court by a compromise decree in 1873. Ever since then the clause has been continued in the annual Kabulyat signed by Khot, neither party apparently attaching any importance to it. The plaintiff now claims that the Government were bound to offer him a Kabulayat in terms of the settlement arrived at in the Ambegaon case. The same question was exhaustively argued in the Ambdosi case, but as the plaintiff said he did not insist on the retention of the clause in the Kabulayat, the appeal Court directed it to be deleted. Mr. Saldanha held that the defendant was bound to apply the agreement underlying the so called Ambegaon clause in the Kabulayats passed from 1869-70 onwards, but any claim on it was time-barred and no estoppel arose thereby. When every year the Government in effect renewed the agreement limitation would run from the date on which the Kabulayat was signed and the demand of the plaintiff in this respect would really be a demand for specific performance. The compromise decree was to the following effect:—

"Parties to the suit agree that a decree be passed providing that the old tenants of the lands entered in the annexed statement shall have non-transferable occupancy rights as therein entered and that the rest of the statement recorded shall be binding on the parties. Each party to bear his own costs throughout."

The statement recorded was a statement showing that privileged customary tenants in the Ambegaon village were to pay "Urdhel" i. e. half share of the produce of the rice lands and Bagayat lands, and "Tirdhel" or one third share of the produce of Warkas lands. In the first place there was no decision of the Court determining the rights of the Khots and the Government, so in any event Government were not bound to ex-

tend the Kabulayat arranged for in that particular case to other villages. In the second place, the rights of the Khot to demand the rent from the tenant was fixed by the provisions of Act I of 1865 and it is doubtful whether in the absence of any agreement, any other terms could be arrived at between the Khot and the Government. In our opinion therefore the fact that this clause remained in the Kabulayat could not bind the Government to enlarge the rights of the Khots against the tenants beyond what was fixed by the Government officer under S. 38 of that Act. So there was no necessity for the continuation of this clause in the Kabulayat which the Khot had to sign. It follows then that the Government are bound to present a Kabulayat in the old form for the plaintiff's signature and on his signing it he will be entitled to recover possession of the village. It seems to us to be regrettable that in so many of these cases in which a dispute has arisen between the Khot and the Government, the issues have been unnecessarily elaborated. The first declaration in the decree we shall now pass is one which could have been formulated without the need for a protracted hearing, and without having to exhibit so vast a number of documents, while the rights and liabilities of the Khot are so clearly stated in the old Kabulayat, that I cannot see myself why there was any necessity for Government to introduce a new form since there is no indication before us to show how the conditions of the tenants could be improved by the new Kabulayat, or generally what benefit would enure to any one concerned. It was suggested that the area under cultivation in some of the villages was being reduced and cultivators might be induced to return if the terms of the Kabulayat were altered, but it is difficult to see how any of the new terms to which we think the Khot was entitled to object, can possibly benefit either Government or the Khot or the cultivators. The relationship between the Khot and the Government, to my mind, is perfectly clear. As stated in Mr. Candy's report it is indubitably established that a Khot's interest in

his village is limited, not established that a Khot's interest in his village is limited, not absolute; he possesses in some measure a proprietary right; in fact he is an occupant with all the rights and liabilities affecting such a status. The Khot has to secure to Government the payment of the village revenue, while the village lands which he has to manage in accordance with the restrictions mentioned in the Kabulayat fall under three distinct classes. These are (1) Dharekari lands the tenants of which have a transferable and heritable right paying Dhara alone to the Khot; (2) Khot-nisbat lands which are either in the hands of permanent occupancy tenants or tenants with less permanent right paying Faida to the Khot and the Government assessment; and (3) Khoti Khasgi lands, private lands, in the possession of the Khot of which he can make such use as he pleases. That being the case there was no necessity whatever to elaborate any further the terms of the Kabulayat. If the Government wish to impose upon the Khot a new form of Kabulayat they must conform to the conditions which we have laid down. They must not infringe the customary rights of the Khots. The result is that the decree under appeal is reversed and it is decreed as follows:—

Declare that the plaintiffs are hereditary farmers of the revenue of their Khoti village in suit, and are entitled to hold the village as Khoti on their entering every year into the customary Kabulayat. They were not bound to execute Kabulayat A as it contains clauses which the Khot was not bound to accept. The attachment of their village in consequence of their refusal to sign the Kabulayat in suit is illegal and they are entitled to have the attachment raised and to recover from the defendant damages from the date of the attachment to the date on which the management of the village is restored. The amount of damages should be determined by the trial Court. Beyond these two questions no other question is decided in this suit with regard to the relationship between the plaintiff-Khot and Government.

1925 B/7 & 8

On the question of costs we have ascertained what costs were actually incurred in the Court below. Except in the two representative suits the costs were extremely small. The plaintiff having succeeded will be entitled to those costs which bear no proportion to the length of time during which the case lasted or the number of documents exhibited.

With regard to the costs of the appeal, undoubtedly costs have been increased by translations of unnecessary documents. We therefore exclude from the costs of the appeal the costs of translations. Each party to pay the costs of his own translations. Apart from that the plaintiff will be entitled to the costs of the appeal.

Cross-objections are dismissed with costs.

I should like to add that we are very much indebted to Mr. Kelkar for having argued the case for the plaintiff in the way he has done in spite of the case as originally set up by the plaintiff. We are also indebted to Mr. Coyajee for the way in which he argued the case for Government.

Shah, J.—I concur.

Decree reversed.

★ ★ 1925 BOMBAY 49

SHAH, AG. C. J. & FAWCETT, J.

Parshuram Dattaram Shamdasani & others—Plaintiffs.

v.

Tata Industrial Bank, Ltd., & others—Defendants.

O. C. J. Appeal No. 3 of 1924, and Suit No. 3643 of 1923, Decided on 21st July 1924.

(a) *Companies Act., S. 79 (i) and of Sch. T. Table A, Cl. 45—Notice calling General Meeting to consider amalgamation of bank with another bank is bad for not disclosing secret benefit received by the Directors under the arrangement. But where such secret arrangement is not proved, proceedings taken on notice cannot be upset for some defect in the notice which might have been avoided but which was not avoided due to some honest mistake.*

Where there is any secret agreement or any interest of the directors in the agreement not disclosed in the circular, or in the notice, the Court will view with strictness any omission to refer to it in the notice or in the circular

accompanying the notice; and the omission to mention any secret arrangement would constitute a serious defect in the notice. But where no secret agreement is proved or suggested any where there is no indication that there was anything to conceal, the Court will as far as possible take a liberal view of the terms of the notice and will not upset the proceedings taken on a notice for some defect which might have been avoided but which was not avoided on account of some honest mistake. A meeting ought not to be treated very critically in order to see whether we cannot pick out some defect in it. [P. 55, C. 1]

Notice calling an extraordinary general meeting of the shareholders of a Bank to consider the proposal of amalgamating it with another bank was held not so defective as to upset the proceedings at the meeting, though it failed to disclose the difference of opinion that existed among the directors in the matter and the basis of calculation on which the terms of union were settled, and although no copy of the agreement between the banks was sent to the shareholders along with the notice.

★ (b) *Companies Act, S. 21*—Limited company has statutory right to amalgamate itself with another company and no express power in the Memorandum of Association is necessary for the purpose:—

Every limited company has under S. 213 a statutory right of effecting an arrangement whereby it is amalgamated with another company. No express power need be contained in the Memorandum of Association of the company. [P. 55, C. 2]

(c) *Company—Amalgamation with another company is not confined to formation of new company to carry on business of the old—There must be sale of assets as a whole in return for shares in purchasing company.*

The amalgamation of a company with another company includes the formation of a new company but is not confined to that. The company in some way or other must sell its assets as a whole not for money but for shares in the purchasing company. [P. 55, C. 2; P. 56, C. 1]

(d) *Companies Act, S. 203 (2)—Mixing up of different matters in same resolution is legal—Companies Act., S. 213 (5).*

A resolution in which the voluntary winding up of the company is mixed up with other matters relating to the agreement of amalgamation with another company is legal. [P. 56, C. 1]

(e) *Companies Act., S. 213—Mere permission to authorise in terms the liquidators to receive compensation and distribute it among shareholders does not make a resolution illegal under the section where the resolution authorises the liquidators to carry into effect the arrangement under which the company is amalgamated with another company.*

The mere fact that in terms there are no words authorising the liquidators to receive compensation and distribute it amongst the shareholders does not make a resolution illegal. [P. 56, C. 2]

Where the pertinent part of the resolution was "they (the liquidators) are hereby au-

thorised pursuant to S. 213 of Companies Act, to adopt the said agreement (relating to the amalgamation of the company with another) and carry the same into effect".

Held that the resolution was legal.

Per Fawcett, J.—The appointment of liquidators is not required to be by "special resolution," the latter being necessary only in regard to the proposed voluntary winding up of the company and amalgamation under S. 213. If any liquidators are proposed in the special resolution, the proposed liquidators may be changed at the confirmatory meeting. Therefore, where the resolution omits saying that such and such persons are hereby appointed liquidators for the purpose of the winding up, and instead of this the notice calling the meeting says that the confirmatory meeting would among other matters consider the question of appointing liquidators, the resolution is quite legal. [P. 61, C. 1, 2]

(f) *Company—Meeting—Point of order assailing competency of the meeting to consider the proposed resolution which is long enough to form a speech against the resolution is properly ruled out as a point of order.*

A point of order which is a request to the chairman to hold that the meeting is not competent to consider and confirm the arrangement, contained in the resolution as it is *ultra vires* of the company and which is long enough to form a decent speech against the resolution, is properly rejected as a point of order as it is for the shareholders to consider whether to accept or reject the resolution. [P. 56, C. 2]

(g) *Companies Act, S. 81—Amendment may be allowed subject to the nature of the resolution and that of the amendment.*

Amendments can be allowed, but it must depend upon the nature of the resolution and the nature of the amendment whether it could be or should be allowed by the chairman. [P. 57, C. 1, 2]

(h) *Company—Meeting—Amendment—Disallowing proper amendment vitiates resolution—But amendment which amounts to rejection of the resolution is illegal.*

Any proper amendment, which is moved by any member at a meeting, should be put to the meeting for consideration and if the chairman rules out any such amendment, the resolution is liable to be set aside. But if an amendment though in form an amendment is really a counter-proposal of a different nature involving either adjournment of the consideration of the resolution or the rejection of the resolution proposed before the meeting, or goes beyond the scope of the subject matter of the resolution, it should be ruled out. [P. 58, C. 1]

Where the matter for consideration before a meeting of the shareholders of a company is whether a particular offer made by a other company in connection with the amalgamation of the two companies, is to be accepted, an amendment, which in effect asks the shareholders to consider that the proposed amalgamation may be modified and which requires something to be done by the other company after the amalgamation is effected, is illegal. But it is open to the shareholders

to adjourn the consideration of the question before the meeting, with a view to further negotiate with the other company and to see whether any counter-offer made by their company would be accepted by the other company. [P. 57, C. 2]

(i) *Company—Meeting—Right of speech—A shareholder is entitled to be heard in reasonable terms for a reasonable time—The question whether the denial of this right vitiates the resolution itself intended to be opposed by him, depends on the circumstances of each case—If it is practically certain that his speech would not have made any difference in the situation, the resolution will stand—Though technically a speaker may seem to elect not to speak as when he resumes his seat when the audience shouts "no" to his appeal to them to hear him, yet, if it may be inferred from the circumstances that if he speaks, he would be prevented from doing so, he should be held to be prevented from speaking.*

A shareholder is not entitled to speak at a meeting as much as he pleases, but has a right to be heard in reasonable terms for a reasonable time. As to whether the denial of this right vitiates the resolution, the proper test is to consider the facts and circumstances of each case and to determine the question in the light of those circumstances.

[P. 58, C. 2 ; P. 59, C. 1]

Though it is a difficult thing to say whether a particular speech will impress the audience in the direction desired by the speaker yet, having regard to the definite hostile attitude which the majority of the share-holders maintain at the meeting with reference to the speaker, as also to the fact that all that he could have said, was really said in the point of order raised by him which was already read to the meeting, though the right of speech is denied to him when he desires to speak to the resolution, the circumstance cannot be accepted as affording a sufficient basis for setting aside a resolution, which represents the ascertained views and wishes of an overwhelming majority of the share-holders. [P. 59, C. 1]

As regards the question as to what constitutes denial of the right of speech, where the speaker appeals to the share-holders, "Brother share-holders, will you care to listen to me," and when they say "no"; he elects not to speak, in substance he is prevented from speaking, if, from the attitude of the share-holders and other circumstances, it may be inferred that if the person thinks of speaking he would be prevented from doing so.

[P. 58, C. 2]

(j) *Company—Meeting—Evidence of proceedings—Evidence.*

The minutes of a meeting are *prima facie* evidence of what happened at the meeting.

[P. 60, C. 1]

(k) *Company—Meeting—Objection to validity of votes must be handed in before the commencement of the poll—It must particularise the votes objected to.*

A point of order objecting to the validity of votes tendered for resolution must be handed to the chairman before he commences to take the poll. Also, it should be directed to particular votes. It is futile for any member to raise a

general objection without indicating the nature of the objection and without any attempt to particularise the votes objected to. It can only be interpreted as a sort of invitation on the part of the member to adjourn the proceedings of the meeting to examine the votes over a day. If the amendment simply says that the person objects to all the votes and if it does so enable the chairman to consider the validity of any particular vote, it is too general to be of any effect and is completely useless.

[P. 60, C. 1, 2]

* * (l) *Company—Meeting—Presumption is in favour of validity of proceedings unless the invalidating fact is established beyond reasonable doubt.*

Court should incline more in favour of the validity of the proceedings than in favour of their invalidity, in the fact which would go to invalidate the proceedings is not established beyond reasonable doubt. The Court should not interfere on the ground of an irregularity in the case of acts which are valid if done with the approval of the majority of share-holders unless the acts complained of are of a fraudulent character or are *ultra vires*. A case of fraud or overbearing influence is necessary for interference by the Court.

[P. 60, C. 1 ; P. 62, C. 2 ; P. 63, C. 2]

(m) *Company—Meeting—Amendment to resolution lost on show of hands—Poll demanded and taken—But before declaration of result of poll, demand for poll and other amendments withdrawn and new amendment allowed—Original resolution is not invalidated.*

The proposal to appoint two liquidators was subject to two amendments, which were duly proposed and seconded. The second amendment was lost on a show of hands. A poll was demanded. The poll was taken, but before the result of the poll was declared a new amendment was allowed to be proposed, the demand for poll and the other amendments being withdrawn.

Held: it was perfectly open to meeting to adopt that course. Even if there was any irregularity it was a matter for the meeting or the chairman to control and that irregularity had not the slightest effect upon the validity of the appointment of the liquidators named at that meeting.

[P. 60, C. 2]

Appellant No. I in person.

Chimantlal Setalvad, Kanga, B. J. Desai, and Engineer — for Respondents.

Facts:—The Appeal arose from a suit instituted by the appellants. The suit was for a declaration that the proceedings of certain meetings of the Tata Bank in which the amalgamation of that Bank with central Bank was determined upon, were null and void. The plaintiffs also prayed for injunction restraining the liquidators and the Banks from carrying out the amalgamation. The Suit being dismissed by the first Court, the appeal was filed.

Shah Ag. C. J.—[His lordship after relating facts and explaining how owing to the financial condition of the Tata Bank it became necessary for it to consider the question of amalgamating itself with the Central Bank, and after giving the main terms of the provisional agreement made between the two Banks, proceeded to consider the circumstances connected with the notice which was issued to the shareholders of the Tata Bank, convening an extraordinary general body meeting of the shareholders to consider the proposal of amalgamation:—]

After this provisional agreement was discussed by the directors the notice in question was issued. I have already referred to the terms of that notice, and along with that notice a circular was issued. It is pointed out in that circular, which was issued by the orders of the Board of Directors, that there was an offer from the Central Bank of India, Limited, to take over the Tata Bank as a going concern on terms of allotting one share of the Central Bank of India, Limited, of the nominal value of Rs. 50 credited as paid up to the extent of Rs. 25 for every two shares in the Tata Industrial Bank, Limited, of the nominal value of Rs. 75 on which the sum of Rs. 22-8-0 per share was paid up. The directors had called for the opinion of the auditors of both the Banks to examine the financial position of the two Banks and it was stated in the circular that the auditors were satisfied that the offer made was fair and equitable and that two shares of the Tata Bank were worth one share of the Central Bank. The result of the amalgamation was stated in the circular to be that the uncalled liability of Rs. 105 which then existed on two shares in the Tata Industrial Bank, Limited, would be exchanged for an uncalled or contingent liability of Rs. 25 per share in the Central Bank of India, Limited.

A reference to the agreement was made in the circular in the following terms:—

"An agreement for carrying the proposed amalgamation into effect has been entered into between Mr. Hormasji Framji Commisariatia shareholder of your company on behalf of your company and the Central Bank of India Limited,

which agreement is conditional upon your sanction of the scheme of amalgamation and a copy of the conditional agreement which bears date July 5, 1923 is open for inspection by any member of your company at the registered office."

The attention was drawn in the circular to S. 213 of the Indian Companies Act and to the rights of the shareholders under that section and it was pointed out that those dissentient shareholders, who would not like to take up the shares of the Central Bank of India Ltd., would be paid as provided, i.e. Rs. 15 per share or such amount as may be fixed by arbitration in the manner prescribed under S. 213. It also mentioned that the Central Bank was not bound to proceed with the scheme of amalgamation if more than one third of the shareholders dissented.

These were the materials circulated to the members and they had an opportunity under the terms of the circular to inspect the agreement if they were minded to do so.

With reference to this notice it is urged:—

(1) That the interest of the directors in this arrangement has not been disclosed;

(2) that the difference of opinion among the directors with reference to this scheme, as indicated in the minutes of the directors' meeting, was not communicated to the shareholders.

(3) that the basis of the calculation adopted by the two banks in arriving at this result, or rather in fixing the price of the Tata Bank concern, has not been disclosed; and

(4) that it was defective because a copy of the agreement was not sent with the circular to the shareholders.

As regards the point relating to the interest of the directors, it has been suggested vaguely that the directors themselves were to benefit under this arrangement, and that there was some kind of secret understanding which was not disclosed. Beyond a suspicion on the part of the plaintiffs that there was some secret arrangement between the directors of the Tata Bank and the Managing Director or Directors of the Central Bank, there is nothing to show any secret arrangement. So far as the record is concerned it is clear that there is no evidence of it, and Mr. Pochkhanawalla, the Mana-

ging Director of the Central Bank, stated definitely as follows:—"There are no terms of the amalgamation not contained in agreement of July 5, 1923." It is true that if there was any kind of secret arrangement between the directors of the two banks, it must be disclosed in the notice and, if it has not been disclosed, the notice would be bad. Such an arrangement cannot be assumed and, if that suggestion is to be made with any effect, it must be proved. It is material to note on this point that in the plaint there is no allegation in the sense that the directors were going to make any secret profit or to get any secret benefit out of this transaction.

The second thing suggested against the directors relates to their liability in respect of certain debts due to the Tata Bank. The liability of the directors is indicated in the balance sheet of March 31, 1923, and is stated thus:—

"Debts due by Directors of the Bank jointly with other persons or against securities and considered good including debts due by the Joint Stock Companies guaranteed by their agents a Director of the Bank being a member of the firm of Agents."

In respect of this liability it is clear that the effect of the agreement is merely to substitute the Central Bank as a creditor instead of the Tata Bank, and there is no suggestion and certainly there is no evidence to show that the directors were in any way placed more favourably with reference to their liability for these debts under the agreement than they were before the agreement with reference to the Tata Bank. Therefore so far as the suggestion that the notice is bad because the directors' interest or any secret arrangement with regard to the directors' interest has not been disclosed in the notice is concerned, it seems to me that the contention of the appellants must fail for the simple reason that there is no evidence whatever on the point in favour of the plaintiffs. On the contrary there is clear and reliable evidence to the effect that there was no arrangement between the two banks except that disclosed and stated in the terms of the agreement of July 5, 1923.

I have so far dealt with the question of the directors' interest which is said not to have been disclosed and

also incidentally with the point that there was an undisclosed agreement which should have been stated in the notice.

The next point is that the difference of opinion among the directors should have been referred to in the notice. I am quite unable to accept this contention. It is true that apparently there was some difference of opinion among the directors up to a certain stage, but they all unanimously resolved on June 27 to refer this matter for the consideration of the shareholders. It may be that there was some difference of opinion among the directors; but I do not see how the omission to mention that circumstance can be said to constitute a defect in the notice. There is no rule of law or prudence which compels a reference in the notice to such differences of opinion among the directors.

The next point is that the basis of the calculation, upon which broadly speaking the terms of this arrangement were settled, is not disclosed in the notice. On this point I do not consider it necessary to go into the details of the figures. They have been explained by Mr. Pochkhana-walla in his evidence and the learned trial Judge has referred to that evidence as follows:—

"266 lakhs as per the balance sheet as at March 31, 1923, plus two lakhs by way of profits and four lakhs by way of appreciation, of Government securities, to be added. That would make a total of 272 lakhs, and making allowance for depreciation in investments prior to March 31, 1923, balance 252 lakhs net assets. Less depreciation made for the purpose of amalgamation, 22 lakhs depreciation in buildings, 15 lakhs depreciation in industrial investments since March 1923, ten lakhs for loss of interest on capital locked up in buildings not let and to meet the claims for compensation by employees, and five lakhs for contingencies. This would make a total of 252 lakhs leaving a balance of 200 lakhs and the assets which form the basis of the calculation for the purposes of the amalgamation scheme."

The learned Judge has referred to these different items in detail, and has expressed his opinion thus:—

"It is clear they refer to details which there was no obligation to set forth in the notice, and which would have been elicited by any intelligent shareholder at the meeting."

I agree with this view of the learned Judge. Apart from that I am of opinion that there is no proviso which

completes any reference to the statement of these details in a notice convening the meeting. It seems to me that what was stated in the circular and notice was sufficient. I do not say that the basis of this calculation could not have been referred to in the circular. If the directors of the Tata Bank thought it proper to do so, they could have done so. But the fact that they have not done so does not, in my opinion, constitute any defect in the notice, much less such a defect as would invalidate it. The information given in the circular was broadly speaking what the shareholders would require as to how they would stand under the proposed agreement with reference to their interest in the bank. It was made clear to them in the circular that so far as they were concerned they were getting the equivalent of their shares with this added difference that the outstanding liability of Rs. 105 on every two shares would be reduced to Rs. 25. It cannot be said that anything more was necessary. It seems to me that the basis which has been disclosed by Pochkhanawalla in his evidence is merely a sort of rough calculation for the guidance of the Bank. But there is nothing on the record to show that that basis was accepted in writing on any occasion. Broadly speaking the basis so far as the Tata Bank was concerned was that all the assets such as they were at the date of this agreement were to be taken over by the Central Bank, subject to their liability to give one share of the Central Bank for every two shares of the Tata Bank with Rs. 25 paid up in respect of that share, and in the case of those shareholders, who were not prepared to accept the shares in the Central Bank they were to get at the rate of Rs. 15 or such further sum as may be determined by arbitration in accordance with the provisions of S. 213 of the Indian Companies Act. It clearly gave notice to the shareholders as to what was proposed to be done. The assets of the Bank were disclosed in the last balance-sheet; and it was made clear that these were to be taken over by the Central Bank subject to their getting this return. If

any further information was needed, as pointed out by the learned Judge, it could have been elicited at the meeting; but if the shareholders were satisfied that no further information was required, that this was a good scheme as regards their interests, it was open to them to accept it without any further information as to the basis of the calculation. I think that the omission to refer to this basis in the notice does not in any sense constitute a defect in the notice.

The last point with reference to the notice is that the copy of the agreement was not circulated along with the notice to the members. The agreement is referred to in the special resolution which is proposed for consideration; and it is also stated that the agreement will be available for inspection at any time to the shareholders, when they would care to have inspection of it. It is also in evidence that this agreement was on the table at the meeting of July 19, though it has been contended on behalf of the appellants that this agreement was not available for reference at the meeting. It seems to me that on the evidence of Mr. Pochkhanawalla it must be held that the agreement was kept on the table for reference at the meeting. Apart from that, I am unable to hold that the omission to send a copy of the agreement to each shareholder with the notice constitutes a defect in the notice.

I have so far dealt with the specific points urged as regards the notice. It may be stated generally that under S. 79 of the Indian Companies Act read with Article 68 of the Articles of Association of the Tata Bank all that was required by law to be stated in the notice was the general nature of the business. The general nature of the business was clearly indicated in the notice and sufficient details were given, which were necessary for the purpose of enabling the shareholders to consider the question. I may state that several cases have been cited with reference to the point of defective notice. I shall mention only *Alexander v. Simpson* (1); *Kaye*

(1) [1839] 13 Ch. D. 139=59 L. J., Ch. 137=61 L. T. 708=38 W. R. 161=1 Mag. 457.

v. Croydon Tramways Company (2); and *Tiessen v. Henderson* (3).

The net result is that where there is any secret agreement or any interest of the directors in the agreement not disclosed in the circular, or in the notice, the Court will view with strictness any omission to refer to it in the notice or in the circular accompanying the notice; and the omission to mention any secret arrangement would constitute a serious defect in the notice. But where no secret agreement is proved or suggested and where there is no indication that there was anything to conceal, the Court will as far as possible take a liberal view of the terms of the notice and will not upset the proceedings taken on a notice for some defect, which might have been avoided, but which was not avoided on account of some honest mistake. On this point, I think the following observation of Cotton L. J. in *Henderson v. Bank of Australasia* (4) is important:—

"I do not think that a notice calling a meeting ought to be treated very critically in order to see whether we cannot pick out some defect in it."

In the present case looking at the notice and the accompanying circular broadly with reference to the facts of the case, I am satisfied that there is no such defect in this notice such as could invalidate it. I concede that more could have been stated in the circular: but there is no essential matter, which can be said to have been omitted in the present case.

I shall now deal with the objections which have been raised with reference to the special resolution. It has been urged that there is no express power in the Memorandum of Association of the Tata Bank to effect amalgamation, that there is no amalgamation between the two banks in the legal sense of the word and as the special resolution purports to effect amalgamation between the two banks, it is illegal and invalid. It is urged that the resolution does not satisfy the requirements of S 203 (2) of the Indian

Companies Act, in so far as the resolution as to the voluntary winding up of the company, is mixed up with other matters. The argument is that there should have been separate resolutions for the voluntary winding up and other matters relating to the agreement. Lastly, it is urged that as the special resolution does not in terms comply with the provisions of S. 213 in so far as it does not expressly authorise the liquidators to receive compensation for disposal among the shareholders it is an illegal resolution.

As regards the first objection, it is enough to say that this action is taken under the statutory right, which every limited company has under S. 213 of effecting such an arrangement, and not under any special power conferred upon the company by the Memorandum of Association. Though a reference has been made to the express power of this kind contained in the Memorandum of Association of the Central Bank of India, Ltd., I do not think that it is necessary to say more on this point, beyond this that if the Tata Bank and the other Bank were both inclined to give effect to such an arrangement, it was perfectly open to the Tata Bank under S. 213 of the Indian Companies Act to sanction a scheme of this nature.

The next point about the amalgamation is also based upon an incorrect appreciation of the meaning of the word. As regards the meaning of this word it is enough to refer to two cases. In *Wall v. London and Northern Assets Corporation* (5) the observations of Lindley M. R. are as follows:—

"No very precise meaning can be given to the word 'amalgamate' when we talk about amalgamating a company with any persons, companies, or firms, and I confess that I am not prepared to put any sharp definition upon the word. I have no doubt that it includes the case put by Lord Hatherley in *Hegg's case* (6) and more recently by Lord Davey in *New Zealand Gold Extraction Company (Newberyvautin Process) v. Peacock* (7). I do not think it involves the formation of a new company to carry on the business of an old company. I have no doubt it includes that; but I do not think it is confined, or understood to

(2) [1898] 1 Ch. 358=67 L. J. Ch. 222=78 L. T. 237=46 W. R. 405=14 T. L. R. 244.

(3) [1899] 1 Ch. 861=68 L. J. Ch. 353=80 L. T. 483=47 W. R. 459=6 Manson 340.

(4) [1890] 45 Ch. D. 330=59 L. J.; Ch. 794=2 Mag. 301.

(5) [1898] 2 Ch. 469=67 L. J. Ch. 596=79 L. T. 249=47 W. R. 219=14 T. L. R. 547.

(6) [1865] 2 H. & M. 657=13 W. R. 937.

(7) [1894] 1 Q. B. 622=63 L. J.; Q. B. 227=9 R. 669=70 L. T. 110.

be confined, to that. I do not see how a company as a business transaction can practically amalgamate with persons or companies carrying on business unless the company in some way or other sells its assets as a whole—not for money, for that would be a simple sale—but for shares in the purchasing company.”

According to these observations, an arrangement like the one we have in this case can be included within the meaning of the word ‘amalgamation’.

In *In re South African Supply and Gold Storage Company* (8) Buckley, J. says as follows :—

“An amalgamation may take place, it seems to me, either by the transfer of undertakings A and B to a new corporation, C, or by the continuance of A and B by B upon terms that the shareholders of A shall become shareholders in B. It is not necessary that you should have a new company.”

It is clear to my mind, therefore, that the use of the word ‘amalgamation’ in the resolution is not inaccurate and cannot possibly constitute any illegality.

As regards the objection based upon S. 203 (2), under S. 213 (5) it is provided that a special resolution shall not be invalid for the purpose of this section by reason that it is passed before or concurrently with a resolution for winding up the company, or for the appointment of liquidators. It has been urged before us that this clause really means that it may be passed at the same meeting, but it cannot be put up in the same resolution. I am unable to accept the contention. I have no doubt that the resolution as framed was a perfectly legal resolution which it was open to the company to accept if it was disposed to do so.

The last point is that the terms of the resolution are not in accordance with the requirements of S. 213 of the Indian Companies Act. Here again it seems to me that the objection is purely technical. It is conceded that the agreement as drawn up is proper in form, and it is clearly within the scope of S. 213. In fact it was said that it was so cleverly drawn up that appellant No. 1 could not point out any defect in the form of the agreement, so far as the requirements of S. 213 were concerned. Looking to the substance of

the resolution it is clear that it was within the authority of the company to pass it under S. 213. On this point I may refer to the following observations in *Imperial Bank of China, and Japan v. Bank of Hindustan, China, and Japan* (9).

“I believe it would have been sufficient if the first notice had gone on and said, ‘This is to be carried out under the Act; or even short of that, if it had given notice to the parties that it was intended to pass a resolution giving authority to the liquidators to carry out the arrangement.’”

In the present case we find the resolution both in substance and form fulfilling the requirements of S. 213. It is true that in terms there are no words authorising the liquidators to receive compensation and distribute it amongst the shareholders; but the fact is clear, and to my mind the point is without any substance.

The next set of points relate to the meeting of July 19. Four points have been urged with reference to the proceedings at this meeting. First, it is urged that the point of order. Exh. L, was wrongly ruled out of order: secondly, that the amendment moved by the appellant No. 1 (Exh. O) was wrongly disallowed; thirdly, that the appellant No. 1 wanted to speak on the resolution after his amendment was disallowed, but in fact he was prevented by a majority of the shareholders from speaking to this resolution, and that as his right of speech is denied to him, the resolution passed at the meeting is vitiated; and, lastly, that the point of order, which he had raised with reference to the validity of the votes, was wrongly disallowed.

As regards the first point, I may mention that the point of order is long enough to puzzle any chairman. It was a request to the chairman to hold that the meeting was not competent to consider and confirm the said arrangement, which was *ultra vires* of the company. I am not surprised that the chairman simply ruled it out of order, and in my opinion, that was the only course which the chairman could reasonably adopt in dealing with it. It was for the shareholders to consider whether to accept or reject the resolution, and looking at this point

(8) [1904] 2 Ch. 268—73 L. J.; Ch. 657—91 L. T. 447—52 W. R. 642—12 Macson. 76,

(9) [1868] 6 Eq. 91=16 W. R. 1107.

of order it might have well formed a speech of decent length against the resolution; but as a point of order it was properly ruled out, and I agree with the learned trial Judge on this point.

The second point is not so easy. With regard to the amendment which he proposed (Exh. O) the learned trial Judge has upheld the decision of the chairman on two grounds. First according to him on a proper interpretation of S. 81 no amendment could be allowed, if a resolution proposed comes under that section. Secondly, having regard to the nature of the amendment, as it was practically a negative of the resolution, it was properly disallowed. The correctness of both these conclusions is questioned before us. As regards the first point it depends upon the interpretation of S. 81 of the Indian Companies Act. According to the decision in *Torbock v. Lord Westbury* (10) an amendment may be allowed at the first meeting, and in the case of a special resolution no alteration whatever will be allowed at the confirmatory meeting. The learned trial Judge has doubted the correctness of this decision; but it seems to me that it is going too far to hold that at the first meeting, when the resolution is to be considered, no amendments could be allowed. It is no doubt a possible view on a strict reading of S. 81 of the Indian Companies Act, which provides that it must be a resolution of which notice specifying the intention to propose the resolution has been duly given. It may be urged that when an amendment is moved, it ceases to be the resolution of which notice is given, and becomes some other proposal than the one contained in the resolution of which the absent shareholders would not have any notice. In spite of this consideration an amendment at the first meeting is allowed under the English statute. In the absence of any decision to the contrary, I am not prepared to go so far as to say that no amendments could be allowed. It must necessarily depend upon the nature of the resolution and the nature of the amendment, whether

it could be or should be allowed by the chairman. Therefore I proceed to consider the second objection with reference to this point. I have already referred to this amendment. It really asks the shareholders to consider that the proposed amalgamation may be modified so as to require the entire values of the properties and assets and capital and liabilities of this company as determined on June 30, 1923, by the Managers and Auditors of this company and the Central Bank of India for the purposes of amalgamation be credited to the capital of the Central Bank of India without any deduction whatsoever and with the further proviso that nothing out of the said values be allowed to be carried by way of premium or otherwise to the reserve fund of the Central Bank of India. This amendment goes beyond the proper scope of an amendment which could be considered with reference to the subject-matter before the meeting. The subject matter for consideration before the meeting was whether the particular offer made by the Central Bank of India on the conditions contained in the agreement was to be accepted by the Tata Bank or not, and they could either accept that offer or reject it. It was perfectly open to them to adjourn the consideration of this question with a view to further negotiate with the Central Bank and to see whether any counter-offer to be made by the Tata Bank would be accepted by the Central Bank. The amendment though in form an amendment was really a counter-proposal of a different nature and in effect it involved either the adjournment of the consideration of the resolution or the rejection of the resolution proposed before the meeting. Further this amendment required that when the transfer was effected the Central Bank was to act in a particular manner with reference to the assets of the Tata Bank, so that nothing out of the said values be allowed to be carried by way of premium or otherwise to the reserve fund of the Central Bank of India. The amendment required something to be done by the Central Bank when the transfer was effected, and when the whole property of the Tata Bank be-

(10) [1902] 2 Ch. 871=71 L.J., Ch. 845=87 L.T. 165=51 W.R. 133.

came the property of the Central Bank. That would be in a sense beyond the powers of the Tata Bank to control. Having regard to the wording of the amendment it is clear that it went so far beyond the scope of the subject-matter of the resolution before the meeting, that it was clearly open to the chairman to rule it out of order. It could not affect the position of the appellant No. 1 in any way; it was perfectly open to him if the amendment was rejected to point out that the resolution as it was framed should not be passed or that the consideration of it should be adjourned in order that further negotiations on the lines which he desired should take place. That was not rendered impossible to him by this amendment being ruled out and on a consideration of the arguments on both sides of the question, I am satisfied that the amendment was rightly ruled out. It is true that any proper amendment, which is moved by any member at a meeting, should be put to the meeting for consideration and if the chairman rules out any such amendment, the resolution is liable to be set aside as was decided in *Henderson v. Bank of Australasia* (4).

The next point relates to the right of speech. The learned trial Judge has found that after the plaintiff No. 1 was disappointed in his attempt to speak on two occasions, first, as regards the point of order, and, secondly, on the amendment which he moved, he really elected not to speak on the resolution and therefore there was no denial of the right of speech. On this point it has been urged before us on behalf of the appellants that the finding that the appellant No. 1 elected not to speak on the resolution is not justified on the evidence in the case. It is urged that having regard to the temper disclosed at the meeting towards him, whether he was in fact prevented forcibly from speaking to the resolution though he attempted to do so, or whether under the circumstances he made a feeble and courteous attempt, which may be interpreted as an election not to speak, in substance he was prevented from speaking on the resolution. On the evidence bearing on this point, which it

is not necessary to discuss in detail, I am satisfied that appellant No. 1 was practically prevented from speaking to the resolution. Even if we accept the evidence of the witness for the defendants on this point that plaintiff No. 1 just appealed to the shareholders 'Brother shareholders, will you care to listen to me, that when they said 'no' he elected not to speak, in substance he was prevented from speaking. Having regard to the incidents that had happened already at the meeting, and to the persistent manner in which the shareholders showed their unwillingness to hear him, it may be inferred that if the appellant No. 1 had thought of speaking he would have been prevented from speaking. I should say that he was practically prevented from speaking to the resolution. On this finding the question arises whether that is sufficient to vitiate the resolution. As regards the right of speech, I may refer to the case of *Wall v. London and Northern Assets Corporation* (5), to which I have already referred with reference to another point. There the Court of Appeal had to consider the effect of a closure applied by the chairman of a meeting. With reference to that the observations of the Master of the Rolls and of Chitty L. J. are practically to the same effect. It is pointed out that the majority must not refuse to listen to the speech of a member in reasonable terms for a reasonable time, and having regard to the circumstances of that case the Court was satisfied that the closure was properly applied and that even if it resulted in negating the right of speech to a particular member, it did not vitiate the resolution. It is difficult to lay down any general rule as to what should be the result where the right of speech is denied to a member in a general meeting of the shareholders. It seems to me that the proper test to lay down is to consider the facts and circumstances of each case and to determine whether the denial of the right of speech is sufficient to vitiate the resolution under the circumstances of that case. I may here pause to point out that those who refuse unnecessarily, out of sheer impatience, to listen for any

reasonable length of time, to any arguments in support of the opposite views incur a grave risk in adopting this attitude of exposing the very resolution, which they may be anxious to adopt, to the scrutiny of the Court and to render it liable to be set aside. The very purpose which they may have in view may be defeated on account of such conduct. It is important that the risk involved in such conduct should be realised by those who resort to it. Apart from that question, however, we have to consider on the circumstances of this case whether the fact that appellant No. 1 was not allowed to speak to this resolution is sufficient to justify our setting aside the resolution. On that point after a consideration of the circumstances I have come to the conclusion that it is not sufficient to justify our setting aside the resolution, and I have been influenced by the following considerations.

In the case of *Parashuram v. The Tata Industrial Bank Limited* (11) the question of the right of speech was considered and Mr. Justice Pratt, referring to the English case to which I have referred, held that a shareholder is not entitled to speak at a meeting as much as he pleases, but has a right to be heard in reasonable terms for a reasonable time. In that particular case that view apparently did not help the plaintiff, and the decision was against him. It is to be noted that the plaintiff No. 1 in this case is the same as the plaintiff in that case. It is material to remember that his general attitude with reference to this bank was known to the shareholders. They were entitled to form their own opinion about his attitude. I am not concerned with the justice of that opinion: but the shareholders knew him as being ready to go against the bank. At the meeting of July 19, with which we are directly concerned, the first thing that happened was that, after the chairman delivered his speech and after the resolution was moved, the point of order Exh. L was handed by the appellant No. 1. This point of order, which is referred to in the

minutes as extending over seven typed pages, was read at the meeting. Thus the view of the appellant was known to the members and the reasons for his conclusions also were known. Then we have the fact that he moved an amendment, which indicated his attitude with reference to the resolution under consideration at the meeting. That amendment was ruled out. Already one member had spoken in fact against the resolution; and it may be said that having regard to the importance of this subject, it is not unlikely that the shareholders may have informed themselves previously and formed certain opinions of their own with reference to the merits of this resolution. At the time appellant No. 1 rose to speak to the resolution they had ample means of knowing what his views were and what his side thought. Under the circumstances if the shareholder or some of them practically refused to listen to appellant No. 1, I am not prepared to hold that that by itself is sufficient to invalidate the resolution. So far as the circumstances are disclosed on this record I do not think that any speech from the appellant No. 1 could have made any difference in the resolution. No doubt it is a difficult thing to say whether a particular speech will impress the audience in the direction desired by the speaker; but having regard to the definite attitude which the majority of the shareholders maintained at the meeting with reference to appellant No. 1, as also to the fact that all that he could have said, was really said in the first point of order, which was already read to the meeting, I am satisfied that though the right of speech was denied to him at that stage the circumstance could not be accepted as affording a sufficient basis for setting aside a resolution, which represents the ascertained views and wishes of an overwhelming majority of the shareholders.

The next objection with regard to the incidents at this meeting relates to the point of order which he handed in to the chairman regarding the validity of the votes. That point of order was in these terms:—

(11) 1924 Bom. 102=47 Bom. 915=25 Bom. L.R. 1083.

"Pursuant to Article 93 of the Articles of Association of the company I challenge the validity of all the votes tendered for the resolution declared by the chairman as having been carried and under the circumstances, the chairman to appoint the day and the time for receiving objections as to the validity of every vote tendered."

The initial difficulty about this point in the story of the appellants is that it does not appear in the record as to when it was handed in. The minutes of the meeting, which must be taken as *prima facie* evidence of what happened at the meeting, contain the following statement.—

"After the close of the poll the business of the meeting was resumed and the chairman, before declaring the result of the poll read out to the meeting a further point of order handed to him by Mr. P. D. Shambdasani challenging the validity of all the votes tendered for the resolution etc., and ruled it out of order."

Though I concede in favour of the appellants that this objection was sufficiently referred to in the plaint, I do not think there is any evidence to show that this was handed in before the poll was commenced. It is significant that we have not been referred to any evidence on the point, and it may well be that the point of order was not handed in time, at least not before the chairman commenced to take the poll. In any case the point is left in ambiguity and assuming that the handing in of such a point of order at the proper time should have prevented the chairman from declaring the result of the poll, it seems to

me that the Court should incline more in favour of the validity of the proceedings than in favour of their invalidity, if the fact which would go to invalidate the proceedings is not established beyond reasonable doubt. I am not satisfied that it was handed in before the chairman commenced to take the poll, and if it was handed in after that work was nearly finished it would be too late. But there is a fundamental objection to this point of order and I am satisfied that the chairman was right in disallowing it. The amendment simply says that he objects to all the votes, it does not enable the chairman to consider the validity of any particular vote. It is too general to be of any effect and no authority has been cited in support of the proposition which the appellant No. 1 has contended for, that the

objection in this general form must be investigated and the proceedings of the meeting adjourned. I am quite unable to accept such a view having regard to Article 93 of the Articles of Association of the Bank, which runs as follows:—

"No objection shall be made to the validity of any vote, except at the meeting or poll at which such vote shall be tendered, and every vote, whether given personally or by proxy, not disallowed at such meeting or poll, shall be deemed valid for all purposes of such meeting or poll whatsoever."

If this objection was to be raised, it should have been directed to particular votes. It seems to me that it is futile for any member to raise a general objection without indicating the nature of the objection, and without any attempt to particularise the votes objected to. It can only be interpreted as a sort of invitation on the part of the member to adjourn the proceedings of the meeting to examine the votes over again. Under the circumstances I am satisfied that this general objection was properly disallowed.

I now come to the confirmatory meeting of August 6. The minutes of this meeting are marked Exh. Q in the case. The resolution which was adopted at the meeting of July 19 was confirmed and there is no objection so far as this confirmation is concerned. But it is urged that the appointment of the liquidators at the meeting is not valid, because there was an irregularity in accepting the final amendment to the proposal. I have already stated that the proposal to appoint two liquidators was subject to two amendments, which were duly proposed and seconded. The second amendment was lost on a show of hands. A poll was demanded. The poll was taken, but before the result of the poll was declared a new amendment was allowed to be proposed, the demand for poll and the other amendments being withdrawn. It seems to me that it was perfectly open to the meeting to adopt that course; and I doubt whether there has been any irregularity in doing so. Even if there was any irregularity it was a matter for the meeting or the chairman to control and that irregularity has not the slightest effect, in my opinion.

upon the validity of the appointment of the liquidators named at that meeting.

[His Lordship, after holding that under the Memorandum of Association of the Central Bank and Article 115 of the Articles of Association of that Bank, it was perfectly open to the directors to act on behalf of the company and that therefore the absence of any resolution of the company accepting the agreement with the Tata Bank did not invalidate the final agreement between the Banks on 7th August, and after referring to other matters not material to our report, concluded by dismissing the appeal with costs.]

Fawcett, J.—I agree entirely with the judgment just delivered, and I shall only add a few remarks on some of the most important of the numerous objections that have been taken by the appellant to the validity of the proceedings. First of all, as regards the use of the word 'amalgamate' in the resolution and the circular, I may refer to Palmer's Company Precedents, 12th Edition, Part I, at pages 1413 to 1415 as showing that this is a popular term which has been used for many years, and which can properly be used to cover a scheme such as the present one under S. 213 of the Indian Companies Act. Secondly, as regards the form of the resolution, I may point out that it follows almost word for word, with a few necessary modifications, the form No. 794 laid down in the same work for such a scheme, and therefore it is difficult to hold that this particular form is one that is contrary to the provisions of S. 213, or is otherwise a form open to objection. In fact the only real departure from Palmer's form is that the resolution omits saying that such and such persons are hereby appointed liquidators for the purpose of the winding up, and instead of this the notice says that the confirmatory meeting would among other matters consider the question of appointing liquidators. It seems to me that that is quite a correct change to make because, as pointed out by the Court of Appeal in *re In Trench Tubeless Tyre Company*,

(12), the proposed liquidators may be changed at the confirmatory meeting. That is because the appointment of liquidators is not required to be by "special resolution," the latter being necessary only in regard to the proposed voluntary winding up of the company and amalgamation under S. 213.

I next come to the chairman's ruling as to amendment proposed by the appellant No. 1. I think that amendment was rightly ruled out of order, because in effect it merely negatived the proposal before the meeting, viz., that the conditional agreement submitted to the meeting should be approved. It is a well recognised rule that an amendment should be affirmative in form, and not merely negative of something already proposed, and be in such a form that a definite decision can be arrived at: cf. *Crew's Procedure at Meetings*, 3rd Edn., p. 111. Thus in the rules laid down for the conduct of business of the Bombay Legislative Council, rule 37 (2), says: "An amendment may not be moved which has merely the effect of a negative vote." See *Bombay Legislative Manual 1920*, at p. 204. The proviso proposed to be added to the resolution would necessarily involve a rejection of the conditional agreement submitted to the meeting, because the consent of the Central Bank of India would be necessary to the alterations that were suggested in this proviso, and unless and until that consent were obtained the amendment would have no effective operation. It was not a practical proposition that the agreement should be approved subject to this particular proviso, and there would therefore be no definite decision on the matter before the meeting. I may in this connection refer to the case of *Wall v. London and Northern Assets Corporation* (5). It will be seen from the report at page 472 that a somewhat similar amendment was proposed at a confirmatory meeting in that case, viz., that the following be added to the resolution.

(12) [1900] 1 Ch. 40869 L.J., Ch. 213=8126 L.T. 247=48 W.R.=310=8 Manson 85=T.L.R. 207.

'Subject to purchaser agreeing to allow any individual or any body of dissentient shareholders to have their share of the assets agreed to be sold in lieu of the London Northern Debentures shares due to them.'

That amendment involved that the purchaser, as here, should agree to a certain change, but the chairman ruled the amendment out of order and moved that the resolution should be confirmed. This was objected to in the arguments before the Court of Appeal. Lindley M. R. (at p. 480) summarily dismissed the objection as being a point with which the Court had nothing to do. Chitty L. J. (at p. 483) mentions this refusal of the chairman to put the amendment at the meeting, and says:—

"His refusal, in my opinion, was right, because that meeting was called for one purpose only, and that was to confirm or reject the original resolution which had been passed, and any amendment would be wholly irrelevant, because the single purpose of the meeting was to say Aye or Nay, is the original resolution to stand or fall?"

I quite recognise that this relates to an amendment proposed at a confirmatory meeting, and not to one proposed at the first meeting, but I think that logically the same reasoning applies to the latter case with some slight alterations, viz., that the one purpose for which this meeting was called was to confirm or reject the particular agreement submitted to the meeting, and an amendment of the kind proposed was inadmissible in view of that particular object. I think that at the most all that could be moved was to adjourn the meeting in order to enable the directors to enter into further negotiations with a view to the suggested alteration of the conditional arrangement between the two companies. No doubt in Palmer's Company Precedents, Part I, at pp. 668-669 a reference is made to *Wright's case* (13). These remarks at first sight seem to support the propriety of an amendment of this kind, suggesting modifications in the conditional agreement, provided such modifications were not more onerous on the company; but if the report of this particular case be referred to, it will be clearly seen from pages 338, 339 and 340 that the modifications there referred to were not modifica-

tions of the actual agreement that was put to the meeting, but modifications connected with the agreement but in regard to matters which were entirely independent of the consent of the other party to the agreement, for they referred to the second and third resolutions mentioned in that report, which dealt with certain arrangements dependent merely on the approval of the shareholders of the company. It seems clear, therefore, that this is not a case, which really supports the contention of the appellants that the amendment was improperly ruled out of order.

The next serious objection taken in this appeal is the alleged denial of appellant No. 1's right of speech at the first extraordinary general meeting. On this point I agree entirely with what has been said by my learned brother. The Court has a discretion as to whether it should, or should not, grant a declaration or an injunction of the kind sought in this suit under Ss. 42 and 54 of the Specific Relief Act of 1877, and the plaintiffs are not entitled to such a declaration or injunction merely because of an irregularity of the kind that is under consideration. Of course that discretion must be exercised on accepted judicial principles, but it is a case where we have English decisions to guide us, and these show that the Court should not interfere on the ground of an irregularity in the case of acts which are valid if done with the approval of the majority of shareholders, unless the acts complained of are of a fraudulent character or are *ultra vires*. In the present case, I think it is important to bear in mind that there are special circumstances, which at any rate give an insight into the point of view of the majority of the shareholders, who refused to hear appellant No. 1. We have his admission, that he used to be in the employ of the Tata Bank and was dismissed by them in 1922. Then we have the case to which appellant No. 1 himself drew our attention, viz., *Parashuram v. The Tata Industrial Bank, Limited* (11) from the report of which it appears that the appellant No. 1 brought a suit against the company in regard to a general meeting.

held on May 1, 1923, at which he objected to the accounts and the directors' report submitted to that meeting and wanted to have a committee of inspection appointed to examine them. Then the point of order that he drew up clearly shows that he was objecting to the whole meeting on the ground that it was illegal. It certainly shows a spirit of obstruction and non-co-operation rather than a *bona fide* effort to help towards a satisfactory solution of the difficulties that confronted the company; and in these circumstances, the majority of the shareholders may have thought his action was not *bona fide* and he would thereby waste their time in bringing reckless charges against the directors and arguing in support of the views contained in his point of order. I think these facts should be taken into consideration in determining whether we should or should not interfere with the resolution on this particular ground. Another point to be borne in mind is that appellant No. 1 might have persisted in trying to speak, and if he had done so he might possibly have succeeded. Such a result is not unknown in political meetings. Finally we have the fact that he had a further opportunity of putting forward his objections to this agreement at the confirmatory meeting held in August, but he did not attempt to avail himself of that opportunity. I, therefore, agree with my learned brother that this is not a case where we should hold the resolution invalid because the appellant was prevented from speaking.

As regards the objections to the appointment of the liquidators at the meeting in August, the learned Judge below has held that there was an irregularity on the reasoning of the judgment in *The Queen v. Roberts* (14) but, if that case is looked at, it will be seen that it contemplates a succession of amendments before the result of the poll is known, so that there would be no finality to the meeting. That is an argument *ab inconvenienti* which does not apply to the present case, because there was a settlement of the dispute about the

persons who should be appointed liquidators, and hence it resulted in finality. The argument based on inconvenience thus falls to the ground, and in my opinion there is nothing in law which makes such a compromise illegal or invalid, even at the stage at which it was arrived at in this particular case. The case is analogous to one where the Court is about to deliver judgment, or even in the act of delivering judgment where it is still open to the parties to come to a compromise, at any rate before the judgment is finally delivered. I have already referred to the case of *In re Trench Tubeless Tyre Company* (12) which is ample authority for the view that the liquidators proposed at the special meeting could be changed or added to, as was done in this case. Under sub-S. (3) of s. 83 of the Indian Companies Act, 1913, the appointment of these liquidators is deemed to be valid, until the contrary has been proved. This has not been done, and this objection therefore fails.

In conclusion, I would only say that I agree entirely with my learned brother in regard to the objection taken about the poll. As to the objections based on the alleged misconduct of the directors, I may refer to *In re Irrigation Company of France, Ex parte Fox* (15) where it is pointed out that a case of fraud or over-bearing influence is necessary to justify interference by the Court. Here it is quite clear that there is no indication of the directors getting any secret profit, and the conditional agreement provided for their not getting any compensation for loss of office. I think there is no substance in the objections which the two appellants have raised to the validity of the resolution, and that therefore the appeal should be dismissed with costs.

Shah, Ag. C. J.—As regards costs, we confirm the order of the lower Court, but we order that there will be only one set of costs in appeal.

Appeal dismissed.

(14) [1863] 3 B. & S. 495=32 L. J., M. C. 153=7 L. T. 822=11 W. R. 362.

(15) [1871] 6 Ch. 176=40 L. J. Ch. 433=24 L. T. 336.

★ ★ 1925 BOMBAY 64

SHAH, AG. C. J. AND KINCAID, J.

Meghji Moorji—Appellant.

v

Tyeballi Kamruddin—Respondent.

O. C. J. Appeal No. 14 of 1924, Suit No. 2591 of 1921, Decided on 29th July 1924.

(a) *Died—Construction—Head lessee not bound to renew head-lease—Covenant to allow renewal to sub-lessee if and when renewal is obtained by head-lessee—Sub-lessee cannot claim right to renewal in perpetuity.*

Where the head lessee in head lease does not bind himself to take out a lease at the end of 99 years' period fixed in the head-lease, but has agreed that if and when the lease, is renewed he and his heirs and assigns would pass on the benefit of that renewal to their lessee, that is not sufficient to give to the sub-lessee the right to the renewal of the lease in perpetuity. [P 65 C 2]

★ ★ (b) *Contract—Waiver must be with intention to waive and with knowledge of all circumstances—Payment by vendee of purchase money, due to mistake induced by advice of solicitors is not waiver of right under covenant for title.*

In order that there may be an effectual waiver of any stipulation in an agreement, it must be intentional and based upon full knowledge of the circumstances. Where there has been no independent investigation of title on behalf of the plaintiff-vendee but, due to a mistake induced by the advice of his solicitors, he pays portion of the purchase money, he does not thereby waive his right to the enforcement of the stipulation by the vendor to make out marketable title. [P 67 C 2]

★ ★ (c) *Evidence Act, S. 115—Vendor and vendee both advised by same solicitors—Both sharing same mistake as to vendor's title due to solicitors' advice—Vendee paying purchase money and vendor utilising it to obtain transfer—Defect in title of vendor discovered—Vendee is not estopped from claiming back purchase money as vendor did not act on faith of vendee's representation.*

Both parties were advised by same solicitors and due to the mistake underlying that advice, which mistake was shared by both parties, the purchaser paid a considerable portion of the purchase money to the vendor who in turn utilised the amount in obtaining a transfer of the property from third party. It afterwards was found that the vendor's title under the transfer was defective.

Held: it was a case of common mistake and it cannot be said that the vendor acted on any belief induced by the representation of the purchaser and that in these circumstances though the matter had gone so far as the preparation of the assignment, the purchaser was not estopped from claiming back the money on the ground that the vendor had failed to make out a marketable title as per covenant. [P. 68, C. 2.]

Quære whether where practically the property has passed, though the legal ownership may not have passed, the purchaser can repudiate the contract on the ground that no marketable title has been made out.

*Judah and Coltman—for Appellant.**Engineer and Desai—for Respondent.*

Facts.—The plaintiff and defendant entered into a contract for the sale of immovable property. The defendant was to obtain a transfer thereof from a third party and then to complete the sale. The defendant undertook to make out a marketable title "free from all reasonable doubt and were misled into believing that the title of the defendant was free from doubt. The vendee paid the purchase money part of which was utilised in paying off the third party from whom the vendee was to obtain the transfer, but the major part of which was used in preparing the assignment in favour of the vendee. In the meanwhile a dispute arose between the vendee and his sub-purchasers of the same property wherein the vendees were held by the Court not to have a marketable title. Upon this, the vendees repudiated the contract and claimed back the purchase money from the vendor on the ground of his having failed in fulfilling his covenant.

Judgment.—[After elaborately setting out the facts of the case and alluding to the points urged on either side, the judgment continued:—]

Before dealing with these points, it may be mentioned that it is not suggested before us that the plaintiff knew at the date of his contract with the defendant, or thereafter, of the express terms upon which the defendant had agreed to buy from Lelinwala. The finding on issue No. 2 by the learned trial Judge is not challenged before us, nor is the finding on issue No. 1 questioned, and it is to be taken as found by the learned trial Judge that the plaintiff did not know that he was only obtaining a leasehold title for a limited term. Though the learned Judge does not consider it necessary to record any finding on issue No. 6, which is whether the defendant has made out such title as he had agreed to make out, it is clear

that for the purposes of this appeal it must be taken that in fact the title which the defendant was able to make out was not marketable. Though the learned counsel for the defendant-respondent has made a somewhat faint attempt to suggest that it may be treated as an open question in this appeal, it seems to me that after the decision of the Court of Appeal between the plaintiff and his sub-purchaser, it cannot be treated as an open question. It may be mentioned that though the parties to this litigation may have known generally that it was a leasehold property, and not a freehold, it has been assumed by the parties throughout in this case that they at least expected, and were entitled to expect, to get a right to the renewal of the lease in perpetuity. The evidence of Mr. Dastur, who acted as a member of the firm of Messrs. Mulla and Mulla in connection with this contract both for the defendant and the plaintiff, says at the end of his evidence :—

“ We didn't quite notice the point regarding the difficulty as to renewal, which was subsequently raised. But I believe I contended with Judan and Saloman that the plaintiff had never agreed to sell perpetual leasehold. When we examined the documents we took the title to be one of perpetual leasehold. I accepted the title on behalf of both, viz., defendant and plaintiff.”

There is no doubt from the correspondence, and also from the evidence recorded at the trial, that at least the plaintiff and his sub-purchasers to whom the property was sold on the same terms on which the plaintiff had bought from the defendant, were under the clear impression that at least title to a perpetual leasehold was to be made out. That is the basis upon which the questions raised on the originating summons were considered ; and that is the basis upon which the decision in that case proceeds.

In this view it is clear that for the purpose of determining whether marketable title was made out, it must be taken that, though it was known to be a leasehold property, it was necessary to make out a title to a perpetual leasehold or at least to the right to get such a leasehold. From this point of view it has been definitely

held that as between the plaintiff and his sub-purchasers the title was not marketable on the ground that Bai Avabai under the lease of 1901 did not bind herself to take out a lease at the end of 99 years' period fixed in the head-lease, but agreed that if and when the lease was renewed she and her heirs and assigns would pass on the benefit of that renewal to their lessee. That was not considered sufficient to give to the subsequent lessees the right to the renewal of the lease in perpetuity, and therefore the title was held to be defective. It is difficult to hold that as between the defendant and the plaintiff, if it is necessary for the defendant to make out a marketable title, that the defect does not exist. Taking it, therefore, for the purposes of this appeal that if it is essential for the defendant to make out a marketable title to this leasehold property in the sense of the lessee getting the right to it as a permanent leasehold, the defendant is not in a position to make out that title, according to the view taken in the proceedings, to which I have referred.

The main point, however, upon which the decision of the lower Court is based, and which has been argued before us, is the point of waiver as to the stipulation to make out a marketable title. Now it is clear that in order that there may be an effectual waiver of any stipulation in an agreement, it must be intentional and based upon full knowledge of the circumstances, then the question is whether the plaintiff in this case is proved to have waived his right to the benefit of this stipulation as to marketable title being made out by the defendant. In connection with this point, it is important to remember that Messrs. Mulla and Mulla had already investigated the title on behalf of the defendant with reference to his contract between the defendant and Lelinwala, and on this point the evidence of Mr. Dastur is important :—

“ Q. Did you tell him what he was purchasing under his agreement ?

A. Yes, I did. That he was practically purchasing the interest of Tyeballi under his agreement. That is he was purchasing the property on the same terms that Tyeballi had

agreed to purchase from Leliwala. The completion of the matter proceeded on that basis. I remember plaintiff's agreement to sell to Simon and Motilal. I wrote to Judah and Saloman, who represented Simon and Motilal that this assignment would be direct to them. I must have received a letter from Judah and Saloman dated March 11, 1920, as per this press copy. They refused to complete before May 31. It was then decided to take an assignment in plaintiff's favour as Shroff and Vachha were pressing to complete the matter on behalf of Leliwala.

Then further on his cross-examination he says :—

" Mr. S. Mulla was only attending to the preparation of the agreement for sale between Leliwala and Tyeballi. After that I was attending to the matter. The title was practically investigated before the agreement was prepared. I had gone through the title deed; so also had Mr. S. Mulla. After the agreement was executed, we had gone through the title deeds again and taken search in the Sub-registrar's office. We hadn't taken search in that office (of head-lease of 1869; his records begin only from 1867). We began only with a title deed of a certain date. I don't remember the year. A clerk took the search, not I. I can't say it was complete before plaintiff became our client. The notes of search are in the missing file. I don't know what took place between plaintiff and S. Mulla, before plaintiff was sent to me. There was no necessity to re-investigate the title after plaintiff became our client and I don't think I did. The agreement between plaintiff and defendant was executed outside our office. Our advice was sought and in regard to that agreement by plaintiff after it had been executed."

This evidence clearly shows that practically the title was investigated by Messrs Mulla and Mulla as regards the contract between Leliwala and Tyeballi, and they made no further effort when they were engaged by the plaintiff to investigate the title so far as the plaintiff was concerned. They were apparently satisfied that a title to a perpetual leasehold was sufficiently made out, and as they did not realise the defect which came to be subsequently discovered, they thought that there was no need to investigate the title further. But it must be remembered that all the knowledge that Messrs. Mulla and Mulla had before the plaintiff engaged them for the purpose of the contract in question, was acquired by them on behalf of Tyeballi, and all the knowledge that they had acquired as regards the terms of the contract between Leliwala and Tyeballi as regards the lease could not be attributed to the plaintiff. In

fact the learned Judge has not attributed that knowledge to the plaintiff, and quite rightly, under the circumstances. The fact appears to be that Messrs. Mulla and Mulla being satisfied as to the marketable nature of the title, they naturally advised the defendant and the plaintiff accordingly, and they accepted that advice. The plaintiff paid Rs. 1,24,000 on April 16, 1920, a substantial part of which was used by Messrs. Mulla and Mulla for the purpose of getting the assignment, which is Exh. 1 in case. On April 20, 1920, it was signed only by Leliwala who got the balance of his money. The defendant beyond paying Rs. 12,000 as earnest money to Leliwala had not paid anything to him, and Rs. 1,16,000 paid on April 20 to Leliwala was part of the money received by Messrs. Mulla and Mulla from the plaintiff. The plaintiff was not present at the time, and he never agreed in terms to accept the conveyance or assignment. It is true that thereafter two letters were written by Messrs. Mulla and Mulla to the plaintiff, one on May 5, 1920, and the other on June 1, 1920. In the letter of May 5 it was distinctly stated that arrangement was made that defendant was to have possession of the property in the sense that he was to receive rents till the balance of the consideration money was not paid by the plaintiff to the defendant and Exh. 1 not completed, as it was intended to be completed. On June 1, again, there was a demand made for Rs. 46,000 and for the completion of the document; but the plaintiff did not reply. Thereafter there was practically silence for a long time until we come to September and October when at the request of Messrs. Merwanji, Kola & Co., Messrs. Mulla and Mulla informed the plaintiff of what the defendant was demanding. As I have already indicated in the statement of facts, that in December 1920, the plaintiff's solicitors Messrs. Captain and Vaidya took practically the same view as to the marketable nature of the title as Messrs. Mulla and Mulla, and on behalf of the plaintiff they did their best to make out a marketable title. Unfortunately, however, with the

best of efforts on the part of the plaintiff to make out that position he failed, and all this time the silence of both parties, namely, of the defendant and the plaintiff, appears to me to be attributable to the fact that they were waiting to see the result of the proceedings taken by the plaintiff to make out a marketable title. As soon as the plaintiff found that he failed in his efforts to make out a marketable title, and that it was definitely held by the Court of Appeal that a marketable title was not made out, he at once wrote to the defendant's solicitors saying that he did not complete the contract, and that the contract was to be treated as rescinded.

Taking the conduct of the plaintiff as a whole, it seems to me that he was first acting according to the advice of Messrs. Mulla and Mulla, and thereafter, according to the advice of Messrs. Captain & Vaidya, and he was as anxious as the defendant to see that the contract was put through. That was natural under the circumstances as he stood to gain by making out that position, if not as much as the defendant, at least to a certain extent, and the defendant was also interested in the same sense. Therefore both the defendant and the plaintiff really were waiting to see the result of the proceedings which the plaintiff took in this matter.

I am not prepared to hold on these facts that there was an intentional waiver of the stipulation as to marketable title, for the simple reason that at the time he had no knowledge of all the circumstances. In fact there had been no independent investigation of title on his behalf. Messrs. Mulla and Mulla who had already investigated the title thought that was sufficient, and under those circumstances it seems to me that it would not be right to hold that the plaintiff was consciously waiving his right to the benefit of the stipulation of marketable title in his agreement. As soon as Messrs. Judah and Solomon found the defect in the title, the plaintiff remained silent and waited to see the result of that dispute. He did his best to see that the dispute was settled in a manner he wished it

to be settled. But he failed, and he at once put an end to the contract. Under the circumstances I am not satisfied that there was any waiver on the part of the plaintiff. Equally I am not satisfied that there was any estoppel in virtue of what happened on April 20, 1920, in connection with the assignment, Exh 1. It is true that the plaintiff paid a part of the purchase money, and the best part of it was used for the purpose of paying off Lelinwala on behalf the defendant by Messrs. Mulla and Mulla. It is also true, as pointed out by the learned trial Judge, that if the purchaser enters into possession or pays the whole or part of the purchase money, or does other acts, which a purchaser is not bound to do until a good title has been made, he may be deemed to have waived objection to the title. The question as to whether the objection as to title is waived, is one of fact, and it may be that under certain circumstances the payment of purchase money may indicate a waiver on his part. But here it seems to me that the whole thing proceeded upon what may be described as an honest error of judgment on the part of Messrs. Mulla and Mulla in advising that marketable title was made out, and so far as the parties are concerned, it must be taken to be a case of proceeding on a common mistake induced by the advice of the solicitors.

With reference to this aspect of the case, it seems to me that the case of *Jones v. Clifford* (1) which the learned Judge had referred to, is somewhat similar to the present case, and it is in favour of the plaintiff, and not against him. In that case it was distinctly agreed that it was to be assumed that a person who died in 1841 was seized in fee of the freeholds, and that the defendant should not "require the production of or investigate or make any objection in respect of the prior title" thereto. The sub-purchaser happened to discover a defect after the title was accepted by the defendant and it was held that the defendant was not precluded by the condition or the acceptance of title

(1) [1876] 3 Ch. D. 779=45 L.J.; Ch. 809=32 L.T. 93.

from taking objection, and the Court could not decree specific performance. Although there was no fraud, there being a common mistake, the defendant there was held to be entitled to an inquiry as to the title to the freeholds at the date of the contract.

Similarly here, though the matter proceeded so far as the preparation of the assignment, Exh. 1, it seems to me that when the defect was discovered subsequently at the instance of the sub purchasers from the plaintiff, the plaintiff is equally entitled to the benefit of the stipulation that marketable title was to be made out, even though he had in a sense accepted the title on April 20, 1920. Under the circumstances of this case it cannot be inferred that he waived his right to the stipulation or that he was estopped. In fact the basis for the plea of estoppel appears to me to be weaker even than the plea as to waiver. Beyond the conduct as indicated by what happened on April 20, 1920, there is nothing in the conduct of the plaintiff to show that he ever represented to the defendant, or that the defendant was in any sense influenced by the representation, that the title was good. In fact both of them were advised by the common solicitors Messrs. Mulla and Mulla, and whatever the mistake underlying that advice may be it was a case of a common mistake. It cannot be said in this case that the defendant acted on any belief induced by the representation of the plaintiff.

The learned Judge has referred to the doctrine of part performance as accepted in *Bapu Apaji v. Kashinath Sadoba* (2). After a careful consideration of the facts of this case, I do not see how that doctrine could apply to this case. There was no question of any defect in the title of the vendor at all. Where there is an agreement for sale, and where there has been transfer of possession in pursuance of that agreement to the purchaser and the contract price has been received by the vendor, the vendor, cannot recover back the possession, but must be prepared to fulfil the contract by executing a conveyance.

(2) [1917] 41 Bom. 438=19 Bom. L.R. 7
—39 L.C. 103.

That really is the result of that judgment. It is not at all clear, and it is not necessary for the purpose of this case to decide, as to whether in a given case where there is admittedly a defect in the title of the vendor, the purchaser could not, even if these things had happened, get the benefit of the plea that he was not bound to complete the contract. That must depend upon the circumstances of the case. That point did not arise for consideration in *Bapu Apaji v. Kashinath*, (2) nor does it appear to have arisen for decision in any of the cases to which reference has been made in that judgment. For instance, in the case of *Karalia Nanubhai v. Mansukhram* (3) to which the learned trial Judge has referred, there was no question of any defect in the title of the vendor at all. No doubt if a stage has been reached in a given case where practically the property has passed, though the legal ownership may not have, the question would arise as to whether the purchaser could repudiate the contract on the ground that no marketable title has been made out. The facts of the present case do not appear to me to invite the application of the principle underlying the decision in *Bapu Apaji v. Kashinath* (2). In the first place, the possession such as there could be of this property, has been with the defendant, and has never been with the plaintiff. It is quite true that as a result of the arrangement it was intended to be given to the plaintiff, if he acted in a particular way. But he never did act in that way and he never took possession. The purchase money was paid in part, and that fact does not appear to me to negative the possibility of a dispute as to marketable title arising between the parties. The dispute did arise in fact, and I have already referred to the way in which that dispute was ultimately disposed of between the plaintiff and his sub-purchasers. The mere fact that Messrs. Mulla and Mulla came to the conclusion that the title was marketable and advised both the parties to act on that basis, and that both parties acted on that basis up to a certain point, does not preclude the

(3) [1900] 24 Bom. 400=2 Bom. L.R. 220.

plaintiff from taking up the position, if he is otherwise able to make out, that the title is not marketable. The decision in *McCulloch v Gregory* (4) appears to be in point. It is not necessary to refer to the observations of the Vice-Chancellor in that case in detail. But the principle underlying that decision applies to the facts of this case. If we were to hold that the plaintiff is estopped from making out the plea that the title is not marketable, or that he has waived his right to the benefit of the stipulation about a marketable title, we would practically be holding that he was bound by the advice of Messrs. Mulla and Mulla which both parties accepted for the time being.

On the whole, therefore we are satisfied that the view taken by the learned Judge in this case is wrong. We allow this appeal, set aside the decree of the trial Court and pass a decree in favour of the plaintiff for Rs. 1,26,000 with interest at 6 per cent. from this date until payment, with costs of the appeal and of the suit. The defendant's counter claim is dismissed. The decretal amount to be a charge on the property in question. We further direct that the amount paid by the defendant to Messrs. Merwanji Kola & Co under the order of this Court dated November 18, 1920, as representing the net rents of the property recovered by the defendant should be paid over to the plaintiff in part satisfaction of this decree.

Appeal allowed.

(4) [1855] 1 K & J. 286—3 Eq. R. 495—21 L. J., Ch. 246—3 W.R. 231.

★ ★ 1925 BOMBAY 69

MARTEN AND KINCAID, JJ.

Hirachand Amersey — Plaintiff—Appellant.

v.

Jayagopal Gangabisham — Defendant—Respondent.

O. G. J. Appeal No. 25 of 1924, Suit No. 3047 of 1920 Decided on 2nd August 1924.

★ ★ (1) *Contract Act, S. 253—Mortgage to firm—Release of property is useless unless executant is authorised by all partners.*

A partnership firm is not a legal entity like a limited liability company. Consequently a conveyance to the firm operates as a conveyance to the individual partners. Release of property mortgaged to a firm as a whole is useless unless it is known who the individual partners are and whether the executant of the release is authorised by them to act on their behalf. Case law discussed. [P 70 C 1]

★ ★ (2) *T. P. Act; S. 55. (1) (b) and (d)—Proof as to release by previous mortgagee—Vendor can end contract if, as proof of release of property by a firm to which it had been mortgaged, merely a release deed signed by one of the partners of the firm and a declaration by him giving out the names of the other partners and undertaking to credit the mortgage amount to the partnership account, are produced.*

The vendee in this country is entitled to require further proof of the release of the property which had been mortgaged to a partnership firm, than merely a document purporting to be signed by one of the partners for the firm as a whole. The vendee is entitled to proof as to who all the individual partners are and as to whether they have authorised the executant to reconvey the property. [P 71 C. 1, 2]

Coltman and Munshi—for Appellant.

Vakeel and B. J. Desai—for Respondent.

Facts.—Plaintiff agreed to purchase a building from the defendant which the defendant had agreed some time ago to purchase from its owner.

The vendor undertook to make out a marketable title free from all reasonable doubts.

The owner had effected a legal and an equitable mortgage on the property, to two different banks. Both mortgages were redeemed. The owner took a release of the latter and reconveyance of the former mortgage. But the documents in each case were signed by only one partner of the firms concerned. Each partner, however passed a declaration disclosing the names of all the partners in his firm and undertaking to credit the amount of the mortgage to the partnership account.

In investigating title to the building sold, the vendee's attorneys sent up requisitions to the vendor's attorneys to produce proofs that the persons who had signed the release and reconveyance deeds were partners in the firms and authorised to receive

the mortgage amount on their behalf. The Vendor's attorneys replied that the requisitions were uncalled for and further correspondence ensued in course of which the declarations referred to above were disclosed to the vendee's attorneys. In the end, the Vendee gave notice to the vendor to complete the sale within a fortnight and made time of the essence of the contract. After some time still, the vendee put an end to the contract alleging that the vendor had failed to make out a marketable title and demanded the return of the purchase-money paid by him. The present suit was for recovering this amount.

Marten J.—[His lordship after stating facts proceeded:—]

In the first place I think it clear that the two mortgages, though taken in the names of the two firms, operated as if they had been taken in the names of the individual partners of those firms. A partnership firm is not a legal entity like a limited liability company. Consequently a conveyance to the firm operates as a conveyance to the individual partners. Authority for this will be found in *Ragoonathdas Gopaldas v. Morerji Jutha* (1) in our High Court, and in *Wray v. Wray* (2) and *In re Smith Johnson v. Bright Smith*, (3) in England. In the present case this construction is quite consistent with the actual definitions used in the various documents Exs. E. to H, viz., "the creditors," and "the mortgagees" and "the releasers" as there defined.

That being so, four questions at least arise, viz. (1) as to whether the vendor had properly shown who the individual partners of the two firms actually were; (2) if so, whether the alleged partners Harilal and Venilal were expressly authorised by their respective firms to execute the releases, in question; (3) if not, were they competent to execute such releases; and (4) what is the effect (if any) in India of a bare outstanding interest being left in a paid off mort-

gagee. In considering these points, one has also to consider whether the purchaser was reasonably protected against any possible fraud by Harilal or Venilal either in collusion with the mortgagor or by deceiving him. For instance if the other partners had brought a suit and proved that Harilal or Venilal was only a *munim* and had no power to sign on behalf of the firm and had wrongfully abstracted the deeds and received payment, would the purchaser have had a good defence, and if so on what grounds?

Now as regards the first point, the vendor in effect asked the purchaser to accept the bare statements of Venilal and Harilal as to the several individuals constituting the two firms, and that they themselves were partners in the two firms respectively, and were duly authorised by their co-partners to receive the mortgage moneys. No independent evidence, either from bankers or merchants or by production of the partnership books or the partnership deed, was forthcoming. There was not even any statement from the other alleged partners, nor from the mortgagor. It may be that the mortgagor honestly thought he was paying the right person. But his means of knowledge are not before us. He is described in the registration endorsements as a merchant and Bania. Accordingly he may have been content to rely on his knowledge as a Bania derived, it may be from his past transactions and supported by his books as to who this partnership firm consisted of, and who generally acted for them and signed on the firm's behalf. If so, a statutory declaration or its Indian equivalent might have been most useful. But in fact none such was shown to us or put in evidence, although I notice from the defendant's affidavit of documents that the mortgagor appears to have made a declaration on the same day as Exs. I and J.

Nor I think was the identification before the Registrar sufficient proof of these matters. The solicitors' clerk who was examined in each case as to identity might have known the individual actually executing the parti-

(1) [1892] 16 Bom. 568.

(2) [1905] 2 Ch. 349=74 L. J., Ch. 687=93 L. T. 394=54 W. R. 136.

(3) [1914] 1 Ch. 937=83 L. J. Ch 687=110 L. T. 898=58 S. J. 494=30 T. L. R. 411.

cular document but yet have been deceived or mistaken as to the executant being a partner and duly authorized to sign. At any rate the means of knowledge of this clerk, viz., Waman Sitaram, as regards Harilal, and H. E. Kapadia, as regards Venilal, are not shown. Nor I think does the attestation by Mr. Minocheher, solicitor and his clerk Narandas, of the two releases, and by Narandas of the two declarations Exs. I and J, satisfactorily conclude the matter. What was wanted was something from the other alleged partners which would bind them, such as the letters from them contemplated in Exs. I and J.

To avoid misconception, I should state that in argument before us the vendor's counsel did not refer to any of these points about the mortgagor or the attestations or registrations. Nor can I find that they were raised at the trial. But I mention them to show that they have not been overlooked.

It was, however, argued that normally in a title where there is a conveyance by A to B, and then another by B to C and so on, a purchaser does not call for evidence of identity unless there is some alteration in the description or some other circumstances to raise a doubt. I quite agree. But here the mortgages were each in favour of a named firm, and the purchaser was only asking for evidence to show who that named firm was, and that the person executing the document was a partner in the firm and was acting with the authority of his co-partners.

In my judgment this was *prima facie* a reasonable demand, particularly having regard to the large amount of the two mortgages, viz., Rs. 70,000 and Rs. 30,000 respectively. Further both firms were Hindu firms, and one knows from experience on the Original Side that great difficulty is often experienced in finding out exactly who the partners in any particular firm are. In some markets the ramifications of Indian firms are such as would startle an English practitioner, particularly as the complication of the joint Hindu family often comes into operation. No

doubt the firms here were shroffs, and accordingly a part of their business would normally consist in lending money on securities. But even in ordinary commercial transactions there may be circumstances which entitle one to be satisfied that what purports to be the signature of a firm has in fact been made by some duly authorised person. Thus in a series of cases which I heard on the Original Side, a Mahomedan firm as part of a compromise with several banks had agreed to give some bills of exchange maturing at long dates. When the bills were handed over, the bank objected that they were not signed by the partner who usually signed for the firm, but by an alleged son and partner. The bills were accordingly returned for re-execution. It was afterwards alleged that on the re-execution it was the son who signed his father's name, and not the father himself. On maturity all the bills were repudiated, and amongst a variety of defences it was alleged that the double execution was an infringement of the local Stamp laws. Eventually the bank succeeded in all the cases except one where the bank manager unfortunately had pasted over the original bill of exchange so that nobody could see what the original document contained, and had then had a new document typed out and executed, but had used no new stamp, with the result that the new document sued on was held to be unstamped and inadmissible. I only mention this as an instance where the banks guarded themselves against possible trickery by refusing to accept the signature of the firm merely because somebody alleged he was a partner, and where subsequent events justified their business precautions.

I, however, wish to emphasize that in the present case there was in fact no fraud or any wrongful application of the moneys. But that did not transpire till the trial. As I have said, to ascertain the legal rights of the parties, we must look closely at what was before the purchaser in September 1920. At that time there was no proof of payment beyond what I have already indicated. Therefore, with great respect to the learn-

ed Judge, I do not think that that issue is affected by the admission made by the plaintiff's counsel at the trial, viz, that he did not dispute that the moneys were repaid by the mortgagor to the respective mortgagees Jayantilal Motilal & Co. and Venilal Bhaichandbhai & Co. as stated in their respective release and reconveyance. For instance, even if the defendant had gone further and had produced at the trial a further release and reconveyance signed by all the partners, that would I think have made no difference. It would then have been too late. The proper time to agree to produce this was in September or October 1920, and not at the trial in December 1923.

Nor with all respect do I agree with the learned Judge when he says: "It is also clear from the correspondence that at no time was it suggested that the moneys borrowed from these two firms were not paid back to those respective firms by the defendant." Assuming that the learned Judge is there referring to the mortgagor Jesingbhai and not to the defendant, the requisitions and correspondence asked first for proof that the actual recipient of the money was a duly authorised agent, and, secondly, that his co-partners should be shown, and that all partners should execute releases. In my opinion these demands involved a demand for proof that the moneys had reached the right quarter. The releases for instance would not be given unless the firms had received the moneys. And in the view taken it is sufficient for a purchaser to make a requisition calling for a release from certain people without detailing all the incidental matters which that release will prove or effect.

Nor can I see that the purchaser ever abandoned his demands to be satisfied on these points, and particularly that Harilal and Venilal should be shown to be partners, although the actual language used in the correspondence extending over several months may, as was only natural, have varied from time to time.

Then, as regards the question of practical risk, it may be that the

practical risk that Harilal or Venilal was not a partner, or was practising a fraud on his co-partners was not great, but nevertheless it existed. The varieties of fraud are numerous, and I do not propose to discuss many possible methods or instances. I have already indicated some. *Marchant v. Morton, Down & Co.* (4) is an illustration of a case where each of two partners had assigned to a different person a debt due to the partnership by a third party. The first assignment was a fraud by one of the partners, and the subsequent contest between the two assignees for priority raised difficult points of law which I will mention later. No doubt in the present case the possession of the deeds by the mortgagor would be a considerable safeguard, but their possession does not entirely negative fraud on master or co-partner. Further, as regards the legal mortgage, the deeds were with the equitable mortgagee, and so a fraudulent person would only have the mortgage deed itself to account for.

Moreover, besides the risk of actual attack by third parties alleging they had been defrauded, there is also to be considered the trouble and possible loss which the purchaser might be put to if he desired to re-sell or to mortgage. A special condition of sale guarding against the present requisitions would be difficult to frame, and might be depreciatory. And no proposed mortgagee could be barred in this way from raising this objection. It is extremely probable therefore that, unless many years had elapsed, he would require similar evidence to what the purchaser actually required, or else would refuse to advance his money.

In this connection the case of *Shrinivasdas Bavri v. Meherbai*, (5) though distinguishable on the facts, is useful to refer to. In that case the vendors had to show in 1913 that an agreement of charge made in favour of Damodaras Sunderdas and Gordhandas Sunderdas jointly in 1892 had been effec-

(4) [1901] 3 K. B. 829.

(5) [1916] 41 Bom. 300=44 L. A. 36=21 M. L. T. 236=32 M. L. J. 175=19 Bom. L. R. 151=(1917) M. W. N. 258=21 O. W. N. 558=39 L. O. 627=25 O. L. J. 311 (P. O.)

tively discharged by a purported release of September 1902 made by Gordhandas alone. This release recited the death of Damodardas in July 1902 leaving Gordhandas as his only heir and legal representative, and that the mortgage had been paid off, and that accordingly Gordhandas thereby released the property from the charge created by the agreement of 1892. Mr. Justice Macleod took the view, which was confirmed on appeal by Sir Basil Scott and Mr. Justice Davar, that the vendor had deduced a marketable title free from all reasonable doubts as provided by the contract. But on appeal to the Privy Council, it was held by their Lordships in a judgment delivered by Lord Parker that the purchaser was justified in requiring evidence that Gordhandas was the sole heir and legal representative of Damodardas, and that the vendors, having refused to supply such evidence, had not deduced the marketable title which they were bound to deduce. They also held that the mere recital of this alleged fact in the release of September 1902 was not sufficient; that the registration of the document made no difference in this respect; and that a condition making those recitals evidence of the facts recited would have been depreciatory. Consequently the purchaser's appeal was allowed, and his deposit was ordered to be returned. It will be noticed from the facts stated at p. 37 that in that case eleven years had elapsed since one of the two joint tenants had released the mortgage and had claimed to be the survivor and the heir of his co-tenant. In the present case the releases were only a little over a year before the suit contract. Further it does not appear to have even been argued that if Damodardas was still alive in 1902, Gordhandas could give a good discharge for the debt as one of two joint creditors, or that if on the other hand Damodardas was then dead, Gordhandas could give a good discharge as the survivor of two joint creditors.

Another test of the reasonableness of the purchaser's demands is to see what the mortgagor himself asked for when he paid off the mortgage

moneys. In each case, he stipulated for a letter to be signed by all the partners stating that the moneys were credited to the partnership account. That comes very near what the purchaser was asking for here, but which the vendor flatly refused to give him. In fact the vendor produced nothing whatever signed by the other partners. Nor is there any material distinction in the fact that the mortgagor was content to pay his money in reliance on a promise to furnish this proof, whereas the purchaser wanted the actual proof first.

In the result, therefore, I am of opinion and so hold that the first question which I have raised should be answered in the negative. Accordingly in my judgment, it was not properly shown who the individual partners of the two firms actually were, nor that Harilal and Venilal were partners in the firms in question.

In the view then which I take that finding is sufficient to dispose of this appeal. But as the matter was fully argued before us, I will deal with the remaining points on the supposition that contrary to the view which I hold, Harilal and Venilal were proved to be partners in the respective firms named in the two mortgages, whether or no all their actual co-partners were also proved.

That being so, I think the second question must be answered in the negative, as the materials before the purchaser were insufficient to show that Harilal and Venilal were expressly authorised by their co-partners to execute the release in question.

The third question raises the point whether the mere fact of being a partner impliedly authorized the executing partner to receive the mortgage moneys and execute these releases. This raises an interesting point of law. Under S. 251 of the Indian Contract Act each partner who does any act necessary for or usually done in carrying on the business of such a partnership as that of which he is a member binds his co-partners to the same extent as if he were their agent duly appointed for that purpose. But the defendant called no evidence as to whether it was necessary or usual for merely one member of a

firm of Hindu shroffs and bankers to execute releases and reconveyances in the name of the firm. And in the absence of such evidence I am not prepared to hold the affirmative. Further, the powers of any individual partner in this respect might be regulated or restricted by the partnership articles, but no such articles were produced. And if it be said that under the exception to S. 251, notice of an usual restriction on the partner's powers would have to be proved, it may be answered that the purchaser would be quite in the dark as to what notice the other partners might be able to prove that they in fact gave to the mortgagor. In this connection I may refer to *Nottingham Patent Brick and Tile Company v. Butler* (6), where the Court of Appeal refused to bind a purchaser where the vendor's title depended on proof of his allegation that he had bought the property without notice of certain restrictive covenants, and so was not bound by them, and could sell free from them.

It was next argued by counsel for the defendant that in India, unlike in England, one partner has the right to execute deeds either of mortgage or reconveyance so as to bind the firm, and that the English rule to the contrary as regards any deeds other than a release of the debt is based on the local technicality that an agent can only execute a deed if authorised by a deed so to do. But it is by no means clear that this proposition is one which a purchaser can safely accept as the settled law of India. The case of *Jugjeewun das Keeka Shah v. Ramdas Brijbookun das* (7) was cited in support of it, but there the respondent was claiming the benefit of the mortgage deed because he was a partner in the firm, though he did not actually join in the deed (see p. 494). So this was really a case of a claim between partners *inter se*, where one partner claimed that the others could not appropriate to themselves the benefits of a particular transaction which had been entered into on behalf of the partnership. So it does not really meet the exact point before me.

(6) [1886] 16 Q.B.D. 778=55 L. J., Q. B. 280=54 L. T. 444=34 W. R. 405.
(7) [1841] 2 M.I.A. 487=6 W. R. 10 (P. C.)

In *Ragoonathdas Gopaldas v. Morarji Jutha* (1) Mr. Justice Farran held that where one partner takes a lease of premises in his own name, though on behalf of the partnership, and with the assent of the other partners, the latter are not liable to be sued by the lessor for the rent reserved by the lease. On the other hand, this decision has been dissented from in *Chinnaramanuja Ayyangar v. Padmanabha Pillaiyan* (8). And in *Asan Kani Ravuttar v. Somasundaram Chettiar*, (9) Mr. Justice Wallace was of opinion that a partner could mortgage partnership property either by deposit of title deeds or by legal mortgage.

But in *Harrison v. The Delhi and London Bank* (10) Mr. Justice Straight thought that the presumption was against the existence of such a power. The learned Judge said at p 459 as follows:—

"It is a proposition of law which I do not think will be controverted that one partner cannot alone create a charge upon partnership real estate without the consent of all his partners, for he by himself cannot give a valid title. According to English law, one person cannot execute a deed under seal for another, unless specifically and in terms authorized by power of attorney or by deed to do so. In India, however, we do not have deeds under seal, nor is written authority absolutely essential, and the question becomes one of fact, namely, aye or no is express or implied authority established from the relations between the parties and the general circumstances of the case. A conclusion in the affirmative should not be drawn except upon cogent and clear evidence, and until so made out the presumption should be in the contrary direction. With regard to the matter before me, I find it impossible to hold that either Burnett or Williamson expressly or impliedly authorized Thelwall to create a charge upon the partnership real estate."

I may also refer to *Sheik Ibrahim Tharagan v. Rama Aiyar*, (11) where it was held that a payment to one member of an undivided Hindu family or to one of several joint creditors will not operate as a payment to all the members or creditors if the payment is fraudulently made to one and not for the benefit of all.

In this state of the Indian authorities, I do not think the purchaser

(8) [1896] 19 Mad. 471.

(9) [1908] 31 Mad. 206=4 M. L. T. 66.

(10) [1882] 4 All. 437=(1882) A. W. N. 87.

(11) [1911] 35 Mad. 685=21 M. L. J. 508=10 I. C. 874=(1911) 1 M. W. N. 442.

could be blamed for desiring to be on the safe side. It must be remembered that he wished to buy the suit property, and not a law suit. Further in the present case under clause 3 of Ex. B, as incorporated in the suit contract Ex. A, it was for his attorneys to say who were the persons who were necessary parties to the conveyance, and under cl. 4 the vendor was to deduce a marketable title free from all reasonable doubts, and should at his own costs do all such things and take such actions and proceedings as might be necessary in clearing up any defect in such title. Then, too, under S. 60 of the Transfer of Property Act, the mortgagees on payment would have been obliged to execute an effective transfer or acknowledgment, and I think it was not unreasonable for the purchaser's attorneys to require this to be done. The mortgagees were several persons, and not merely Harilal or Venilal. And whether this transfer was to be effected by a separate document or by joining the mortgagees in the conveyance itself as contemplated by clause 3 of Ex. B was a mere matter of detail. The effect would be the same.

Then it was said that at most this was a defect of conveyance and not of title, and that consequently clause 4 did not apply, and we were referred to *Sands To Thompson, In re* (12) as to the legal position of a paid off mortgagee in English law. It is not always easy to say whether a particular objection is one of title or of conveyance, and in the view I take it is unnecessary to determine that point in the present case. In my judgment having regard to the definite and final refusal of the vendor to procure any release or reconveyance from the other partners, it would only have been a waste of time on the part of the purchaser to submit a draft conveyance including their names. Further, it may be that having regard to clause 3 of Ex. B such a conveyance ought to have been drawn and prepared by Payne & Co. themselves. In my opinion the vendor had definitely refused to perform his promise in its

entirety, and consequently the purchaser was justified in putting an end to the contract under S. 39 of the Indian Contract Act, and was not obliged to tender the conveyance or the purchase money.

In this connection I may refer to *Nott v. Riccard* (13). In that case by the conditions of sale the vendors were bound to furnish a certain declaration as to seisin free from incumbrances. They furnished an insufficient declaration, and on May 30 they positively refused to furnish any other. Completion was fixed by the contract for June 22. On July 23 the purchaser gave notice that unless the requisite declaration was furnished within a fortnight, he would rescind the contract, which he accordingly did on August 10, as default was made by the vendors. It was held that the purchaser was entitled to rescind the contract. There the learned Judge laid stress on the fact that the vendors had positively refused to furnish any further evidence, and he doubted whether any further time was necessary to be given, but that at all events fourteen days were sufficient, for it gave the plaintiffs sufficient time to consider whether they would or would not insist that they had shown a good title. The judgment then proceeds (pp. 311-12): 'For if they did so insist, then the purchaser says, 'you have not and I will put an end to the contract. It is not, therefore, a question whether the vendors should have more time, but whether they had shown a good title at this time or not; that is the real issue between the parties.'

Turning next to English law, it may be conceded that at law a payment to one of two joint creditors is a good discharge of the joint debt. There is also some authority to show that in law a partner may release a debt by deed. On the other hand the general rule is that a partner has no authority to execute deeds in the name of his co-partner. Accordingly it has been held that he cannot at law assign a partnership debt to a stranger by deed, but that in equity the assignment may be good as an

(12) [1883] 22 Ch. D. 614=52 L. J.; Ch. 406=48 L. T. 210=31 W. R. 397.

(13) [1856] 22 Beav. 307=25 L. J., Ch. 618=2 Jur. (N. S.) 1038=4 W. R. 269.

equitable assignment. See *Marchant v. Morton, Down & Co.* (4) and *In re Briggs & Co., Ex parte Wright* (14). But although a joint debt may be released at law by a payment to one of two joint creditors, it does not follow from this that in equity the property would be discharged from the mortgage debt. The mortgagee for instance might have incurred costs for permanent improvements which in the absence of any express covenant he could not recover at law, but which in equity the mortgagor would be forced to pay as a condition of being allowed to redeem. The distinction is well illustrated in two cases of *Matson v. Dennis* (15) and *Powell v. Brodhurst*, (16) which do not appear to have been cited in the Court below.

In *Matson v. Dennis* (15) the head-note runs:—

"Where an equitable charge is vested in two persons even as joint tenants the money cannot be paid to one without special authority from the other, so as to discharge the estate which forms the security"

There by a deed of May 1832 certain property had been mortgaged by way of demise for a term of 600 years to three mortgagees named Waller, Chapman and Roddam to secure a sum of £3751 and interest. In 1845 this mortgage was alleged to have been paid off. By that time all the original mortgagees were dead, but their respective personal representatives were parties to the release which the mortgagor took. Two persons named M'Leay and Dykes were also made parties to the release, which recited that a sum of £3,000, part of the whole £3,751, had not been the money of Waller, Chapman and Roddam, but had been advanced by M'Leay and Dykes out of moneys belonging to them jointly and upon a joint account, and was still due to them upon that account, and that the remaining £751 had been the moneys of Roddam and was then due to his personal representatives. The deed then witnessed that in considera-

tion of £3,000 paid to M'Leay and Dykes and of £751 paid to the executors of Roddam, the respective personal representatives of Waller, Chapman and Roddam assigned the aforesaid term of years, and the representatives of Waller, Chapman and Roddam, and also M'Leay and Dykes, released the mortgaged property and the mortgagor from the debt of £3751 and every part thereof. All parties executed the deed except M'Leay. Receipts were endorsed upon the deed, but as regards the receipt for £3,000 which was expressed to be paid "to us" this was signed by Dykes only. There Knight-Bruce L. J. said at p. 350:—

"The question is, whether when an equitable charge is vested in two persons—and as I will assume as joint tenants—the money can be paid to one without any special authority from the other so as to discharge the estate. I am not speaking of an action. I am speaking of discharging an equitable burden upon an estate, and so discharging the estate."

"In my judgment, and in the absence of special circumstances such as are not shown to exist in the present case, that cannot be done. The purchaser is entitled to have it taken here, that Mr. M'Leay was alive at the time, and that some money has, without any consent on his part, been paid to the other joint tenant or tenant in common. That, I repeat, in my judgment, does not discharge the estate in equity. Especially in the case of vendor and purchaser I think the purchaser has a right to say that the whole £3,000 was not shown to be discharged, but that it is consistent with the evidence to suppose that it may be still an available charge in equity. It is very likely that there is no serious ground of danger to the estate on this point. There is this however:—that it may in prudence necessitate special conditions when the present purchaser shall sell again, if he shall do so, which special conditions may alarm some purchaser or intended purchaser; and I think therefore that the Appellant is entitled to have more proof than at present he has, that the charge of £3,000 no longer exists."

It will be noticed that there the Court thought that the purchaser was entitled to consider the most adverse contingencies in the absence of evidence to the contrary. And as appears from the report in 12 W. R. 596 of the case in the Court below, they were reversing the decision of Stuart V. C. who had held that Dykes' receipt would discharge not only the debt at law, but the estate in equity.

In *Powell v. Brodhurst*, (16) the head-note runs:—

"Where mortgagees have advanced money on a joint account, payment to one of them

(14) [1906] 2 K. B. 209=75 L. J., K. B. 591=95 L. T. 61.

(15) [1864] 4 D. J. & S. 345=10 Jur. (N. S.) 461=10 L. T. 391=12 W. R. 926.

(16) [1901] 2 Ch. 160=70 L. J., Ch. 587=84 L. T. 620=49 W. R. 532.

during the others' lifetime, though a good discharge of the debt at law, only discharges the security to the extent of the payee's beneficial interest (if any), even though the payee ultimately becomes the survivor in the joint account."

There the question was which of two innocent parties was to suffer by the fraud of a solicitor named Cartmell Harrison, who was a partner in a firm of Ingram, Harrison & Ingram. The mortgage was made in 1872 in favour of two mortgagees for £6,000, and in each of the years 1875 and 1886 the mortgagor had paid the above firm of solicitors £1,000 which was duly applied towards reduction of the debt. In 1892 the mortgagor sent a further £1,000 to this firm, which was misappropriated by Harrison. Meanwhile the mortgage had been transferred in 1890 to one J. C. Ingram and Baron de Paravicini, who in fact were co-trustees although this fact was kept off the title in the usual way. Ingram was a partner in the above firm. At the trial it appeared that Ingram did not attend to any business after 1891, and that neither he nor his co-trustee had expressly authorised the firm to receive the £1,000 paid in 1892, and that it was very possible that neither of them knew of the payment. Ingram survived his co-trustee and died in 1897. The question then arose whether the new trustees could claim £4,000 or only £3,000 under the mortgage.

There Mr. Justice Farwell said at p. 164: "In my opinion, the old rule of common law, that payment to one of two joint creditors is a good discharge of the joint debt, still remains good." The learned Judge then held that this proposition was not affected by *Steens v Steeds* (17). Next, after pointing out that the joint debt in that case was not paid to either of the joint creditors, but to the firm of which one of them was a member, but that he did not propose to base his judgment solely on that ground, the learned Judge proceeded to say at p. 165 as follows:—

"The real contest between the parties has been as to the extent to which the property is charged. The plaintiffs argued that, even assuming that the £1,000 has been paid off, so that £3,000 only could be recovered under the

covenant at law, nevertheless the defendant can only redeem on payment of the full £4,000. The defendant argued that the mortgage is merely a security for the debt covenanted to be paid, and that if, and so far as, the debt is gone, the mortgage must be diminished to the same extent, and, indeed, *Stuart v. O.* decided the case of *Matson v. Dennes* (15) on this very ground."

Then, after dealing with *Matson's case* (15) the judgment went on at p. 167:—

"The fallacy of the defendant's argument consists in the assumption that the question whether the money covenanted to be paid is recoverable at law is the only relevant consideration in foreclosure or redemption proceedings and in a disregard of principles of equity that underlie foreclosure and redemption. The mortgagee's estate is absolute at law on breach of the covenant to pay on the appointed day, but the Court interposes for the benefit of the mortgagor on the terms that he does equity. The mere payment of the principal and interest legally recoverable is not necessarily sufficient. For example, money laid out in permanent improvements may have to be paid, although there is no covenant under which it could be recovered at law. If a mortgagor chooses to pay otherwise than in strict accordance with the terms of his contract he does so at his own risk. The proviso for redemption in a mortgage to sever al is never expressed to take effect on payment to the mortgagees or either of them, but to the mortgagee or the survivor of them; and if a mortgagor pays to one although such payment may be a good discharge in law, yet the matter is at large when he comes to equity, and the Court takes into consideration all the facts of the case, and ascertains whether the payee was beneficially entitled to the whole or to a part only, or whether he was a trustee with the other mortgagee, and trusts the payment as good in whole, or in part, or altogether bad accordingly. It is not a question of fixing the mortgagor with notice of a trust, but it is the inquiry that the Court makes to satisfy itself that it is just and equitable under all the circumstances to deprive the mortgagee of his legal title to the property comprised in the mortgage. This is an answer to the argument of the defendant—that James Ingram was the actual survivor, and therefore could have received the money and given a valid receipt at a later date. The mortgagor did not, in fact, pay to the survivor, but to one of two. He can rely on the receipt as at the time when it was given, and he has only himself to thank because he chose to pay otherwise than in accordance with the contract. Indeed, on his own evidence he trusted to the firm of Ingram, Harrison & Ingram to do what was right with the money, and to indorse a receipt for the £1,000 on the mortgage."

The Court accordingly held that the loss of £1,000 fell on the mortgagor and that he had to pay it over again.

I recognise that that was a case of payment to one of two joint tenants, and not to one of several alleged partners as here. But in the ordinary

(17) [1889] 22 Q.B.D. 537=58 L.J., Q.B. 302=60 L.T. 318=37 W.R. 378.

course in England the mortgage would be to all the partners by name or perhaps to some of them, and the reconveyance or release would be by the same persons. So the exact point which we have here would be unlikely to arise. At any rate no English authority precisely in point was cited to us. *Marchant v. Morton, Down & Co.*, (4) which I have already referred to, was not a case between mortgagor and mortgagee, but between rival assignees of the same debt. There Mr. Justice Channel held that one partner had no power at law to assign a debt by deed, but that the assignment could operate as a mere contract to assign, and so be valid as an equitable assignment, and accordingly that as the second assignee in point of date was the first to give notice to the debtor, he was entitled to priority. *In re Briggs & Co.: Ex parte Wright* (14) was also a case of assignment of book debts, and not a case, as here, between mortgagor and mortgagee. *Wilkinson v. Lindo* (18) and *Hawkshaw v. Parkins* (19) are difficult to follow apart from the head notes, the one case depending on the technicalities of Common Law pleadings long since obsolete, where the only order was that one party should have liberty to amend; and the other being a case before Lord Eldon who, as was his wont, gave his judgment or reasoning in different portions extending over many months. The actual decision in that case at p. 545 seems to have left it open whether a release by one partner would be good at law, although it must be good in equity as an enforceable agreement or equitable assignment.

Further in the present case, as regards the legal mortgage, I think it would be quite clear that under English law the purchaser would be entitled to a reconveyance from all the partners, as otherwise some portion of the legal estate would be left outstanding. On proof of payment of the mortgage debt, no doubt this outstanding estate would be only a bare legal estate, but it would be one which the purchaser would nevertheless be entitled to have got in.

Nor do I see that requisitions like those in the present case need necessarily cause any practical trouble in either Indian or English business dealings. If one partner is to be authorized to receive all the mortgage moneys and to execute reconveyances in the names of himself and his co-partners, a clause to that effect can easily be inserted in the mortgage: or else a power of attorney executed. Then the mortgagor will be quite safe in paying to one partner only. As Lord Justice Farewell pointed out in *Powell v. Brodhurst* (16) in the passage I have already cited, the usual proviso for redemption stipulates for payment to all the mortgagees or the survivors of them, and not to the mortgagees or some or one of them. In other words it stipulates for a payment to all, and not merely to one.

Accordingly on the whole I think the English authorities are not of much assistance to the vendor in the present case, but rather the reverse.

In the result, therefore, as regards the third question, I am of opinion that on the facts before the purchaser, the powers of the alleged individual partner under Indian law were sufficiently doubtful to justify the purchaser in refusing to accept a release or reconveyance executed by that one partner only.

Lastly, on the fourth question, I come to the interesting point as to what is the effect in India of obtaining a reconveyance by only one of, say, two joint mortgagees, where the original mortgage was a legal mortgage. I need not repeat what I have already said about the English law on that point. Further it is clear in England that as regards a mere equitable mortgage, a receipt for the mortgage moneys would be an effective discharge to the mortgagor without any reconveyance of the land. Accordingly Mr. Vakeel for the vendor advanced the interesting argument that as in India legal and equitable estates are not known as such to the law, so also there is no difference between legal and equitable mortgages and that consequently in the present case a mere receipt for the mortgage moneys would be a sufficient discharge to the mortgagor without

(18) [1840] 7 M. & W. 81.

(19) [1818] 2 Swans 539=19 R. R. 125.

any reconveyance at all, just as would be the case in England as regards an equitable mortgage.

The learned counsel proceeded to support his proposition by a detailed reference to the Transfer of Property Act, and various text books and to a few authorities. I confess I am sorely tempted to deal fully with this interesting topic which Mr. Vakeel has raised, more especially as the actual authorities cited did not deal with the precise point which was before me. But I feel that, having regard to my conclusions on the other points, it is unnecessary for me to decide that point. I will only say that if reconveyances are wholly unnecessary, and that a mere receipt does all that is requisite, it is a pity that the Code did not state so specifically, and also define more clearly the precise interest which at most a mortgagee can take in the land. I may also point out that a reconveyance shows on the face of it whether all or what exact portion of the mortgaged property is retransferred to the mortgagor, and that it also contains a covenant by the mortgagees that they have done no act to incumber the property so retransferred. A mere receipt has neither of these advantages.

Upon a consideration then of the whole case, I find myself unable to adopt the findings which the learned trial Judge arrived at. In my judgment the purchaser was substantially right in the requisitions and demands which he made, and the vendor was wrong in refusing to comply with them and consequently in cancelling the contract.

Accordingly I would allow the appeal, and would decree that the defendant do pay to the plaintiff the sum of Rs. 20,000 together with interest at 6 per cent. per annum from January 22, 1920, to judgment. Costs and interest on judgment at 6 per cent. Costs to include costs throughout including costs of this appeal. The purchaser's claim for damages appears from the learned Judge's judgment at p. 45 to have been abandoned at the trial, so I need say nothing further as to that.

Kincaid, J.—I concur.

Appeal allowed.

★ ★ 1925 BOMBAY 79

SHAH. AG. C. J. AND KINCAID, J.

Mukundchand Balia—Appellant.

v.

Sobhagmal Gianmal—Respondent.

O. C. J. Appeal No. 60 of 1924:
Suit No. 1379 of 1921, Decided on
10th September 1924.

(a) *Contract—Kacchi Adat—Kaccha Adatia in Bombay makes contracts on behalf of up-country constituent with third parties—The third parties are responsible to the constituent for losses—Constituent's name is not disclosed to the third party—But the third party's name is disclosed to the constituent—Both the constituent and the Adatia are responsible to the third party.*

A *Kaccha Adatia* in Bombay enters into transactions on behalf of his up-country constituent with third parties in Bombay, and when he enters into such transactions under instructions from his up-country constituent, the third party is responsible for the losses to the up-country constituent. To the third party in Bombay, both the *Kaccha Adatia* and his constituent would be responsible. The name of the up-country constituent is not communicated to the third party in Bombay, but the name of the third party with whom the *Kaccha Adatia* transacts business on behalf of the up-country constituent is communicated to the up-country constituent. The *Adatia* enters into contracts with the third parties in Bombay on behalf of his up-country constituent as an agent, the name of the principal not being disclosed. 7 Bom.L.R. 213 Foll. [P. 81 C. 1]

(b) *Contract—Wagering contracts—Teji Mandi transactions.*

There is no presumption as regards *Teji Mandi* transactions that they are wagering transactions. 1923 Bom. 408 Foll. [P. 82 C. 2]

★ ★ (c) *Contract Act, S. 30—Wagering Contract—Intention to deal only in differences must be common to both parties.*

Where an agent makes contracts on behalf of his principal, with third parties who do not intend to deal only in differences, the contracts are not wagering contracts though between the agent and principal there is an understanding that the agent should manage to see that the principal is not called on to take or give delivery, but merely to pay differences. [P. 83 C. 1]

In order that a transaction may be treated as a wager, it is essential that the common intention of the two parties should be to deal in differences only. [P. 83 C. 1]

Where there is an understanding between a principal and an agent that the latter while making contracts on behalf of his principal, should manage to see that the principal is not required to take or give delivery but only to pay differences, but where the intention of the third parties with whom the agent makes the contracts is not to deal in differences only,

there is no wagering contract, as the understanding between the agent and the principal alone is not enough, but the third parties on the one side and the agent and principal on the other must together agree to deal only in differences. [P. 81 C. 2]

B. J. Desai and M. C. Setalvad—for Appellant.

Thanawalla and Campbell—for Respondent.

Shah, Ag. C. J.—The plaintiff in this case carried on business in Bombay as a shroff and merchant and Kaccha and Pakka Adatia at the material time. The defendant resided and carried on business at Itchhavar within the territory of the Bhopal State under the name and style of Bagmal Gianmal and Sobhagmal Thanmal. As an up-country constituent the defendant did business in Broach and Bengal cotton through the plaintiff in Bombay. He employed the plaintiff as his Kaccha Adatia to do business for him in forward transactions in cotton. The transactions commenced in Samvat 1971, but we are not concerned with the transactions of the Samvat years 1971, 1972 and 1973 directly. In Samvat 1974, there were various forward transactions and Teji Mandi transactions carried out by the plaintiff on behalf of the defendant, and there was a certain sum due by the firm of Sobhagmal Thanmal to the plaintiff, which also was included in the agency account for the Samvat year 1974.

The plaintiff filed the present suit in March 1921 to recover Rs. 1,83,632-5-6, inclusive of interest up to the date of the suit, on the agency account between him and the defendant for the Samvat year 1974.

The defendant pleaded that the sum due by the firm of Sobhagmal Thanmal was not rightly included in this agency account, and that the plaintiff's claim in respect of that sum was barred by limitation. Further it was pleaded that the amount of the profit made in respect of jute, the plaintiff should give credit to the defendant in this account. The principal defence was that all those forward transactions and Teji Mandi transactions were wagering transactions. This defence was put in the written statement in this form:—

"The defendant admits that the plaintiff acted in Bombay as the Kaccha Adatia of the said two firms in various transactions. The defendant says that the transactions in Broach and Bengal cotton and the Teji Mandi transactions in Broach cotton were all wagering and gambling. The defendant says that it was agreed and understood between the parties that as regards transactions in Broach and Bengal cotton only differences were to be paid and received and that the plaintiff should not upon the defendant's orders enter into any transactions therein with any person or firm who were likely to insist upon delivery being given or taken."

On these pleadings several issues were raised, and the three points of defence, which I have just mentioned, were considered by the learned trial judge on the oral and documentary evidence in the case. The learned Judge came to the conclusion that the item of Rs. 10,521-9-6 was properly included in the agency account as between the plaintiff and the firm of Bagmal Gianmal, that it was done with the consent of the firm of Sobhagmal Thanmal, in which another partner Khemraj Maganlal was interested along with the defendant Sobhagmal Gianmal. As regards the transaction of 546 jute bales, the learned Judge held that it was a transaction on behalf of the defendant, and that as it was a joint venture of the plaintiff and the defendant, it could not form a proper item in the cotton agency account. As regards the principal defence of wager, the learned Judge came to the conclusion that there was an understanding between the plaintiff and the defendant that the plaintiff was not to call upon the defendant either to give or take delivery on any occasion, and that the transactions were in the nature of wagers, even though the actual contracts entered into by the plaintiff with third parties in Bombay on behalf of the defendant were not wagering transactions. The learned Judge was of opinion that the nature of the contracts with the third parties entered into by the plaintiff on behalf of the defendant could not affect the question as between the plaintiff and the defendant as to the transactions being wagers. Accordingly he came to the conclusion that the forward transactions and the Teji Mandi transactions in cotton in respect of

which the plaintiff claimed the various amounts, were wagering transactions, and dismissed the suit with costs, except the costs of issues Nos. 1, 2, 3, 7 and 8, which costs were ordered to be paid by the defendant to the plaintiff.

The plaintiff has appealed to this Court from the decree passed by Mr. Justice Kemp; and the principal question in the appeal is whether these transactions between the plaintiff and the defendant are wagering transactions. It is necessary to state at the outset the course of business between the parties. It is an admitted fact that the plaintiff was employed by the defendant as his Kaccha Adatia in Bombay, and all the transactions, with which we are concerned in this suit, were carried out by him as a Kaccha Adatia. The incidents of Kacchi Adat in Bombay have been stated by Chandavarkar, J. in *Fakirchand v. Doolub* (1). Though the course of business in the present case may vary in some details, in all essential particulars the course of transactions here resembles that stated in the judgment to which I have just referred.

It is not disputed and cannot be disputed that a Kaccha Adatia in Bombay enters into transactions on behalf of his up-country constituent with third parties in Bombay, and that when he enters into such transactions under instructions from his up-country constituent, the third party is responsible for the losses to the up-country constituent. To the third party in Bombay both the Kaccha Adatia and his constituent would be responsible. The name of the up-country constituent is not communicated to the third party in Bombay, but the name of the third party with whom the Kaccha Adatia transacts business on behalf of the up-country constituent is communicated to the up-country constituent. The Adatia enters into contracts with the third parties in Bombay on behalf of his up-country constituent as an agent, the name of the principal not being disclosed. I may mention that these facts are practically admitted by the defendant. In his evidence he

admits that he employed the plaintiff as his Kaccha Adatia at four annas commission. He admits that he was responsible if the other party failed. By the expression "other party" is meant the third party with whom the contract is entered into by the Adatia. Then in cross-examination he admits that the plaintiff was not liable for loss of the goods on these transactions, and that the plaintiff used to inform him of the persons with whom the transactions were effected.

Thus it is essential to remember that when under instructions from the defendant, the up-country constituent, the plaintiff entered into transactions with third parties in Bombay as his Kaccha Adatia he did so in terms on behalf of an undisclosed principal as his agent, and the privity was established on his entering into these transactions between the third parties and the defendant. Exhibit M contains entries in defendant's journal showing the names of various persons with whom the particular transactions were entered into by the plaintiff on behalf of the defendant. The defendant admits that the names of third parties were communicated to him by the plaintiff, and though Exh. M does not relate to the transactions in suit, it is clear that the course of business with reference to the transactions in suit was exactly as I have just described.

The defendant's case then is that he had arranged with the plaintiff that he should never call upon him to give or take delivery. He has stated in his evidence this agreement in these terms:—"I agreed to give business on terms, I was only to pay differences and not give or take delivery and so also his constituents." Thereby he means that even the third parties with whom the plaintiff entered into transactions on defendant's behalf were not to give or take delivery.

It may be stated that the learned Judge has found in fact, and the record justifies the finding, that so far as the third parties in Bombay were concerned, the transactions were not wagers, and that, as between the plaintiff and the defendant on the one hand

(1) [1905] 7 Bom. L. R. 213.

and those third parties on the other, the transactions were such as could be enforced in law by or against them. At p. 55 of the Paper Book, Part I, the effect of the evidence is stated. The plaintiff's evidence on this point, which is practically unchallenged, is to the effect that the transactions with third parties were not wagers, that is, they did not agree to deal in differences only. It may also be mentioned that the transactions in suit, like other transactions in the previous Samvat years, were arranged, at least in part, by the defendant's Munim in Bombay with third parties, and that the plaintiff's name was given as the Kachha Adatia for the defendant by the Munim of the defendant. Exhibits A, B, C and O are letters evidencing this course of conduct; and it is indisputable that at least some of the transactions were arranged with third parties in that way, i. e., not directly by the plaintiff, but by the defendant's Munim, and then the plaintiff was informed as the Kachha Adatia for him. The learned Judge has not read these Exhibits in the sense in which I have just described them. But those letters are typical of the manner in which some of the transactions were entered into, and clearly show that in fact several transactions were arranged in that way, that the defendant's Munim brought about the transactions, and finally effected them through the plaintiff as the defendant's Adatia, the intervention of the plaintiff being necessary as the Bombay merchants, with whom these contracts would be entered into, would ask for guarantee for the payment of losses on behalf of the up-country constituent.

Most of the transactions in suit were forward transactions in Broach cotton, and some were Teji Mandi transactions in cotton. In this case there is no essential difference between the Teji Mandi transactions and the forward transactions in Broach cotton, so far as the plea of wager is concerned. It is not suggested before us that there is any evidence to distinguish the Teji Mandi transactions from the forward transactions in Broach cotton. Either

all these are wagering transactions or none of them is a wagering transaction according to the argument before us. It is, therefore, unnecessary for us to deal separately with the forward and Teji Mandi transactions. Though the learned Judge was rather inclined to the view that the Teji Mandi transactions would be *prima facie* wagering transactions, he treated both the sets of transactions practically on the same footing on the evidence; and it is a matter to be decided on the evidence in the case, as to whether all these transactions are shown to be wagering transactions. I may mention that there is no presumption as regards Teji Mandi transactions that they are wagering transactions as pointed out by this Court in *Manilal Dharamsi v. Allibhai Chagla* (2).

I agree with the learned Judge in his conclusion of fact that the defendant must have pointed out to the plaintiff that he would not be in a position to give or take delivery, and that the defendant arranged with the plaintiff that he should not be called upon to give or take delivery. I do not consider it necessary to examine in detail the evidence bearing on this point, namely, that as between the plaintiff and the defendant there was an understanding that the plaintiff would not call upon the defendant either to give or take delivery.

On these facts the question arises whether the transactions in suit can be treated as wagering transactions. The learned trial Judge is of opinion that the circumstance that there was no arrangement with the third party that he should only receive or pay differences is immaterial, if there was an arrangement with the agent that the defendant would only be called upon to pay or receive differences. In coming to this conclusion the learned Judge has been influenced by the decision in *Munilal Raghunath v. Radhakisson Ramjiwan*. (3), Apart from the decisions, where the plaintiff is employed as a Kachha Adatia by an up-country constituent,

(2) 1922 Bom. 408—47 Bom. 263—24 Bom L. R. 812.

(3) [1921] 45 Bom. 386=62 I. O. 361=22. Bom. L. R. 1018.

and where transactions are entered into by the Adatia with third parties in Bombay, and where we have, as in this case, the circumstance that the intention of the third parties is not shown to be to deal in differences only, it seems to me that it is not enough for the defendant to prove an agreement between himself and his Adatia that the Adatia would so arrange business for him as not to require him to give or take delivery. In order that a transaction may be treated as a wager, it is essential that the common intention of the two parties should be to deal in differences only. The two parties to the contract in this case would be the defendant and his agent on the one hand and the third party with whom the Adatia enters into the contract on behalf of the defendant on the other hand. It is essential for the defendant to prove, not what his arrangement with the plaintiff was, but as to whether there was a common intention to wager as between him or the plaintiff on the one hand and third party on the other. In this case it is established that the contract which is entered into by the Adatia on behalf of the up-country constituent is a real contract which is enforceable against the third party by the defendant. The mere fact that as between the defendant and his agent there is an arrangement that the agent shall so arrange business as not to require the defendant to give or take delivery is a matter which does not affect the nature of the contract as between him and the third party in Bombay, but is a matter merely between him and the plaintiff, not affecting the nature of the contract. Having regard to the admitted course of business between the parties and the law on the point, I should feel little difficulty in holding that the plea of wager is not open to the defendant, unless he is in a position to prove that the transactions entered into with third parties on behalf of the defendant were wagers, i. e., that the common intention of the defendant and the plaintiff and the third parties was to deal in differences only.

Coming to decided cases on this point, it seems to me that the ratio

decidendi in *Perosha Cursetji v. Manekji Dossabhoy* (4) supports the view which I have just mentioned. In *Sassoon v. Tokersey*, (5) it has been pointed out that in order "that a transaction may fall within S. 30 of the Indian Contract Act, there must be at least two parties, the agreement between whom must be by way of wager, and both sides must be parties to the wager." Though the position of the agent in that case was not exactly the position of a Kaccha Adatia, as in this case, but in essential respects it closely resembled the position of the present plaintiff. There it was held that unless the common intention of the two parties was to deal in differences only, the contracts could not be treated as wagering transactions.

As regards *Manilal Raghunath v. Radhakisson Ramjiwan* (3) it must be remembered that it was the case of a Pakka Adatia. The position of Pakka Adatia is essentially different from that of a Kaccha Adatia. The incidents of Pakki Adat in Bombay have been stated in *Bhagwandas v. Kanji* (6) and that statement has been approved by their Lordships of the Privy Council in *Bhagwandas Parasram v. Burjorji Ruttonji Bomanji* (7). In *Manilal Raghunath v. Radhakisson Ramjiwan* (3) the two questions which may arise for consideration in a case of that character have been stated by the learned Chief Justice. With reference to the first question, namely, "If the contract between the parties was one of employment for reward was it knowingly made to further or assist the entering into of agreements by way of gaming or wagering?" the learned Chief Justice proceeds to point out what the defendant would have to prove in order to succeed on that issue; and among the four points stated the last one shows that, even if the plaintiffs did not contract with third parties in

(4) [1898] 22 Bom. 899.

(5) [1904] 28 Bom 616=6 Bom. L. R. 521.

(6) [1907] 30 Bom. 205=7 Bom. L. R. 611.

(7) [1917] 42 Bom. 373=45 I. A. 29=23 M. L. T. 203=34 M. L. J. 305=4 P. L. W. 229=6 A. L. J. 241=37 O. L. J. 358=(1918) M. W. N. 315=22 O. W. N. 625=20 Bom. L. R. 561=7 L. W. 577=44 I. C. 284=11 Bur. L. T. 211 (P. O.).

pursuance of their orders, differences would be received and paid exactly as if they had. That situation could arise in the case of a Pakka Adatia, because as between the Pakka Adatia and the up-country constituent both are principals with reference to the contract, and it does not matter in the least as to whether the Pakka Adatia has entered into other contracts with third parties to cover that contract or not. It is entirely a matter of his discretion and choice to enter into contracts with third parties; but the contract between the Pakka Adatia and the up-country constituent is complete. In the case of a Kaccha Adatia it is not so. If the Kaccha Adatia does not enter into a contract with a third party in pursuance of the instructions given by the up-country constituent, there is no contract, and the order of the constituent remains an unexecuted order. It is only when he enters into a contract with the third party on behalf of his constituent that the contract is complete, with this additional circumstance that the Kaccha Adatia guarantees payment of losses on behalf of the up-country constituent to the third party in Bombay. Further, in *Manilal Raghunath v. Radhakisson Ramjiwan* (3) this very point has been emphasized at P. 419 of the report by the following observations:—

"The parties to a contract are always principals but if the contract is one of agency, the contract which the agent enters into in pursuance of the agency may be made by him with a third party: (1) either as agent in which case he is not liable, or (2) as principal without disclosing the fact that he is an agent, in which case the third party has nothing to do with the party employing the agent until he is disclosed, or (3) the agent may be personally liable to the third party as well as the person employing the agent."

And the learned Chief Justice has pointed out, there that the transactions in that case came under none of the three categories specified by him. In the present case, the contracts clearly fall within the first and third categories. As I have already pointed out, the contract is complete as between the defendant and the third party in all respects, with this additional circumstance that the Kaccha Adatia stands guarantee for the

payment to the third party in Bombay for losses, and that the name of the up-country constituent is not disclosed to the third party, though the fact that the Adatia is acting as an agent is undoubtedly disclosed to the third party in Bombay. In such a case the transaction may be a wagering transaction but only if the common intention of the two parties, i. e., the third party in Bombay and the up-country constituent, to deal in differences only is proved. Unless that is proved, it cannot be treated as a wagering transaction.

It is not necessary to refer to the evidence in this case that the contracts with third parties were real contracts and not wagering transactions. The learned Judge has accepted that view of the evidence, and that is not challenged before us on behalf of the defendant. We are unable, therefore, to agree with the learned Judge that it is immaterial in the case that the transactions with third parties were not wagering transactions. In order to establish his plea, it is necessary for the defendant to prove that the common intention of the defendant and the plaintiff on the one hand, and of the third parties on the other, was to deal in differences only. No doubt in the written statement, the defendant did say that the transactions with third parties were of that nature, and in his evidence no doubt, in the passage which I have already quoted, he does mean to say so. We are not clear from the judgment of the learned Judge as to whether he believed the defendant on the point that the intention of third parties was also to deal in differences only. However that may be, we are quite clear that on this record, the only evidence in support of the plea that the common intention of the third parties was to deal in differences is the statement of the defendant himself, which is contrary to the rest of the evidence in the case, both documentary and oral. So far as the defendant means to say that the agreement was that the contracts with third parties were to be wagering contracts, his statement cannot be relied upon. We are unable to believe the defendant if he means to say that

the plaintiff agreed to do business on the terms that though he would be liable to the third parties for all the losses, he would not require the defendant to give or take delivery, and further that that he would do business on lines which would not give him any legal right to recover the losses which he may have to pay to the third parties. It is difficult to believe that any party would agree to do business on those terms. In fact Mr. Campbell on behalf of the respondent contended as follows:—
 “We offered to do business on the terms ‘heads I win, tails you lose;’ and the plaintiff agreed to do business on those terms.” We do not believe that the plaintiff agreed to do business on those terms, but we believe that the plaintiff agreed to accommodate the defendant so far that he would not insist upon the defendant giving or taking delivery in any of these transactions. That by itself would not make these transactions wagering transactions.

We find in favour of the plaintiff on the plea of wager and hold that the plaintiff is entitled to recover the losses incurred in respect of these transactions on behalf of the defendant. In this view of the plea of wager, Bombay Act III of 1865 does not present any difficulty in the way of the plaintiff being able to recover the amounts due on the agency account. The defendant does not admit the statement of accounts as put forward by the plaintiff in respect of these transactions in his written statement. The parties do not agree before us, and a specific issue was raised in the trial Court as to what amount was in fact due on these transactions to the plaintiff. There must be an inquiry as to the amount due on the account.

As regards the sum which was due by the firm of Sobhagmal Thanmal, it has been urged before us that the sum has been wrongly carried into the agency account on behalf of the defendant. But on a consideration of the evidence on this point, we accept the conclusion reached by the trial Judge that the sum was properly carried into this account practically with the consent of the parties concerned.

We do not see any reason to differ from that view. The fact that no demand was made on the firm of Sobhagmal Thanmal also supports the view that the sum was properly carried into this account.

As regards the jute transactions, though it was a joint venture, we see no objection to allow credit to the defendant in this suit. The plaintiff does not object to this suggestion of the defendant.

We allow this appeal, set aside the decree of the trial Court, and refer the matter to the Commissioner to ascertain what is due to the plaintiff on the agency account, and direct, that in taking the account the sum of Rs. 10,521-0-6 should be treated as an item in the agency account, and credit may be given to the defendant for the sum due to him in respect of the transactions relating to 546 jute bales.

The plaintiff to have the costs of this appeal and of the suit except the costs of issues Nos. 7 and 8 in the suit. As regards costs of issues Nos. 7 and 8, we direct that each party should bear his own costs in the suit. Further costs and directions reserved.

The cross-objections are dismissed with costs except so far as allowed by our order as to the transaction in jute.

Appeal allowed.

★ ★ 1925 BOMBAY 85

MARTEN AND KINCAID, JJ.

Bai Dosibai—Plaintiff—Appellant.

v.

Bai Dhanbai—Defendant—Respondent.

O. C. J. Appeal No. 12 of 1924, in Suit No. 108 of 1923, Decided on 5th August 1924.

★ ★ *T. P. Act, S. 55 (1) (a)—Non-disclosure of restrictive covenant contained in the conveyance to vendors from original owners and of vendors' breach thereof entitles vendee to repudiate contract.—Mere reference to the existence of some covenant without mentioning even its purport is not enough—When the restrictive covenant is that no building should be built within certain distance of certain boundary, merely stating that the property is a building estate and the purchaser should erect boundary walls in conformity with the covenant contained*

in the conveyance to the vendor from the original owners, is not sufficient disclosure on vendor's part and vendee can repudiate contract where the other terms of his contract with the vendee profess to confer an un-encumbered interest subject to certain specific conditions mentioned, none of which affects the question involved in the restrictive covenant. But vendee will lose his right to repudiate unless he does so immediately on discovering the true facts. But unless he has waived his rights in the matter he can insist on vendor curing defect in title, by giving reasonable notice to the latter and, if vendor fails to do so, vendee may repudiate contract.

Non-disclosure of a restrictive covenant contained in the conveyance to the vendors from the original owners and non-disclosure of the vendors' breach of the covenant amounts to a serious breach of duty by the vendor and entitles the purchaser to repudiate the contract on discovering the true facts. Mere reference to the covenant without mentioning even its purport is not enough.

Where the restrictive covenant is to the effect that no building should be constructed within certain distance of a certain boundary, the mere fact that one of the clauses in the vendors' contract with the vendee states that, "the property forms part of a building estate," and another clause states that the purchaser has to erect boundary walls in conformity with the covenant in that behalf contained in the conveyance in favour of the vendors from the original owners does not imply the existence of such restrictive covenant and amount to notice thereof sufficient to answer for the vendor's duty to disclose material defect, where the recitals in the contract between the vendor and the vendee and other clauses therein make it clear that the sale is to be free from incumbrances, that the vendors are to make out a marketable title, free from all reasonable doubts, claims and demands, subject to the special provision of certain clauses, none of which clauses however, affects the question of the restrictive covenant but refer only to certain other matters. But the purchaser must repudiate the contract as soon as he finds that the vendor cannot make a good title. Otherwise he may insist on the contract being fulfilled by the vendor acquiring the title and curing the defect therein. But he must give a reasonable notice to the vendor to cure the defect. It is also open to the vendee to waive his rights in the matter, and thereby forfeit his rights against the vendor. But clear proof of such waiver is necessary. If vendor fails to cure the defect within the reasonable time fixed, vendee can repudiate the contract. [P. 87. C. 2, P. 91, C. 2]

Coltman and Kanga—for Appellant.

Munshi and Kania—for Respondent.

Marten, J.—This is an appeal from the judgment of Mr. Justice Shah dismissing the plaintiffs' suit for specific performance, and allowing the counter claim of the purchaser, defendant No. 1, for the return of her

deposit of Rs. 5,000. The litigation turns on a restrictive covenant contained in the conveyance of September 24, 1918 (Ex. G), from the then owners of the Forjett Street estate, and on a similar covenant in the subsequent conveyance of June 14, 1920 (Ex. C), to the original plaintiffs Nos. 1 and 2 and Pestonji Edulji Mistry since deceased. The latter is now represented by his administratrix Bai Dosibai, who is the original plaintiff No. 3 and the present sole plaintiff. The original plaintiffs Nos. 1 and 2 have become insolvent, and are now represented by the Official Assignee, the present defendant No. 2.

I will refer to the above covenant as the 7½ feet covenant, and it runs as follows:—

"That no building or other structures whatsoever whether temporary or permanent and no tree or shrub shall at any time be built, entered or placed or planted or suffered to be or to grow on any part of the land and premises hereby granted, conveyed and transferred within a distance of 7½ feet from the southwestern boundary line of the plot hereby granted, conveyed and transferred and dividing the said plot No. 12 on the vendor's said Forjett Street estate except with the consent of the vendor or others the owners for the time being of the said plot No. 12."

The suit property thereby conveyed and subsequently sold to the first defendant was plot No. 11 on the Forjett Street estate.

If one turns to the plan (Ex. H in this Court), the suit property is there shown as lying to the north or north-west of the double line coloured green and orange. Plot No. 12 which had the benefit of this restrictive covenant lies to the west or south-west of the suit property. The earlier conveyance of September 24, 1918 (Ex. G) had contained a similar covenant by the then owner of plot No. 12 as regards the land retained by them. The result of this mutual covenant was to ensure a strip of 15 feet of open space, viz., 7½ feet on either side of the boundaries of plots Nos. 11 and 12.

In fact the 7½ feet covenant was broken by the original plaintiffs, for in 1921 or thereabouts a building was erected on the suit land, which for a length of about 40 feet was only 2½ feet instead of 7½ feet from the boundary line of plots Nos. 11 and 12, and

it is not shown that this was done with the consent of the owner of plot No. 12. This building is marked C on the above plan. The portion hatched red represents the portion built in breach of the $7\frac{1}{2}$ feet covenant, and represents an area of 40 feet by 5 feet or an aggregate of 22 square yards. I may here explain that the northernmost land coloured green represents hilly ground, and that the adjoining open space coloured purple represents ground which was hilly, but which has since been levelled to the level of the first floor of the suit building, so we are told by counsel.

Now when the original plaintiffs came to sell the suit land to the purchaser for Rs. 66,000 under the suit contract of September 8, 1922 (Ex. B.) they not only omitted to disclose to the purchaser the fact that this building was erected in breach of the $7\frac{1}{2}$ feet covenant, but they did not even disclose to the purchaser the existence of the covenant at all. This, in the absence of any explanation, was a serious breach of their duty as vendors, and might entitle the purchaser to repudiate the contract on discovering the true facts.

The English authorities are clear and emphatic as to the duty of a vendor to disclose material defects, and I need only refer to *Nottingham Patent Brick and Tile Company v. Butler* (1); *Carlsh v. Salt* (2); *In re Jackson and Haden's Contract* (3) and *Halkett v. Dudley (Earl)* (4). No Indian authorities were cited to us, but under S. 55 (1) (a) of the Transfer of Property Act, the seller is bound to disclose to the buyer any material defect in the property of which the seller is and the buyer is not aware, and which the buyer could not with ordinary care discover. Under the concluding words of S. 55 an omission to make such a disclosure is fraudulent. *Prima facie*, therefore, such an omission may be also a "fraud" as defined by S. 17 (5) of the Indian Contract Act, and so

render the contract voidable at the option of a purchaser under S. 19, if his consent to the agreement has been caused by the fraud. Or else a purchaser may sue for rescission under 35 of the Specific Relief Act. See ill. (a).

It is argued by the plaintiff's counsel that though the defendant had not express notice, she had constructive notice of this covenant inasmuch as clause 6 of the suit contract states that "the property forms part of a building estate," and clause 17 states that the purchaser has to erect boundary walls "in conformity with the covenant in that behalf contained in the conveyance in favour of the vendors dated June 14, 1920." It is accordingly argued that the $7\frac{1}{2}$ feet covenant is a usual one to find in a building estate, and that the reference to the conveyance of June 14, 1920, gave notice of all its contents. In my judgment both these contentions are unsound. The recitals and clauses 1 and 10 make it clear that the sale was to be free from incumbrances. By clause 7 the vendors were to make out a marketable title free from all reasonable doubts, claims and demands, subject to the special provisions of clauses 4, 5 and 6. Now clause 4 related to a mortgage, which was to be reconveyed, clause 5, to a disused water trough, and clause 6, to the title-deeds being in the possession of the original owners of the building estate. So none of these clauses really affects the question for I cannot accept the suggestion that the mere reference to a building estate would imply the existence of such a covenant as the $7\frac{1}{2}$ feet covenant.

Turning next to clauses 15, 16 and 17, clause 15 deals with certain rights of way and drainage etc., for the benefit of the purchaser. Clause 16 refers to the strip marked "open space" on the plan Ex. H which lies on the south or south-east of the suit building. It is agreed by counsel before us that the reference in clause 16 to the "south-west" is an error. The effect of clause 16 is that the whole of this open space is to be left unbuilt upon and open to the sky, and that the purchaser is to get the corresponding 5 feet on the other side of this

(1) [1885] 16 Q.B.D. 778—55 L.J., Q.B. 280—54 L.T. 444—34 W.R. 405.

(2) [1906] 1 Oh. 335—94 R.T. 58—54 W.R. 244—75 L.J., Oh. 175.

(3) [1906] 1 Oh. 412—94 L.T. 418—54 W.R. 434—75 L.J. Oh. 226.

(4) [1907] 1 Oh. 590—96 L.T. 539—51 S.J. 290—76 L.J., Oh. 330.

southern boundary. So in all there would be an open space of 20 feet. It appears that there was a contemporaneous sale of this southern adjoining land to the father of the defendant's daughter-in-law, and it is said that clause 16 embodied the mutual agreement of all parties, but nothing turns I think on this. The materiality of clause 16 is that indirectly it would force the defendant to comply with the $7\frac{1}{2}$ feet covenant so far as regards this southern strip, except that she would not be prohibited from planting shrubs, or perhaps trees. Then clause 17 dealt, as I have said, with the boundary walls on the north-east and west sides.

Accordingly the contract contained express reference to many special matters including some of a restrictive nature. In my judgment therefore a purchaser might fairly assume that every material fact had been disclosed. He would certainly never expect to find that a serious restriction, such as the $7\frac{1}{2}$ feet covenant was never even mentioned. Nor, I think, would the mere reference to the deed of June 14, 1920, in connection with another matter, viz., boundary walls, put him on his guard in this respect, or oblige him to look at this deed to see if it contained anything beyond what the vendors said it contained. It must be clearly remembered that it was the duty of the vendors to disclose the existence of the covenant, for it was a material defect in their title. They knew their own title and the purchaser did not. The English cases of *Reeve v. Berridge* (5); *In re White and Smith's Contract* (6) and *In re Haedick and Lipski's Contract* (7) illustrate the necessity of an express and full opportunity of inspection of a lease if a purchaser is to be bound by onerous and unusual covenants which are not specifically mentioned. A mere reference to the lease itself is insufficient. I may also refer to *Cox v. Coventon* (8) and *In re*

Morsh Earl Granville (9). So, too, if one turns to the definition of "notice" in S. 3 of the Transfer of Property Act, I think it cannot be said here that there was any wilful abstention from any enquiry or search which the purchaser ought to have made or any gross negligence on her part before she entered into the contract.

In my judgment, therefore the suit contract did not give constructive notice of the $7\frac{1}{2}$ feet covenant to the purchaser. It follows, therefore, that, having regard to this covenant, the vendors were not in a position to carry out their contract, viz., to sell the property free from all incumbrances, unless at any rate they could procure a release of the $7\frac{1}{2}$ feet covenant and a waiver of all past breaches of it from the owners of plot No. 12.

The plaintiff, however, contends that the purchaser has waived her rights under the contract inasmuch as the purchaser's solicitors in their requisitions and correspondence only took objection to the covenant so far as regards the existing building "C" and not as regards the rest of the land, and were content to ask for the consent of the owners of plot 12 to the erection of such building and that such consent was obtained in time, though not until after the defendant had purported to rescind.

Alternatively the plaintiff says that assuming the purchaser had a right of repudiation on discovering the true facts, she was bound to exercise that right promptly, and that by treating the contract as subsisting after the discovery of the defect she precluded herself from exercising the right of repudiation at a subsequent time without first giving the vendors a reasonable time to cure the defect, which in fact she did not do.

This alternative point does not seem to have been argued in the Court below, and was only advanced before us at a late stage in the arguments. But as it seems to me to be the crux of the case, and to derive direct support from the equitable principles enunciated in *Halkett v. Dudley (Earl)* (4) and several earlier authorities, I will proceed to deal with it at once.

(5) [1888] 20 Q. B. D. 523=58 L. T. 836=36 W. R. 517=52 J. P. 549=57 L. J. Q. B. 265.

(6) [1896] 1 Ch. 637=74 L. T. 377=44 W. R. 424=65 L. J. Ch. 481.

(7) [1901] 2 Ch. 666=85 L. T. 402=50 W. R. 20=70 T. L. R. 772=70 L. J. Ch. 811.

(8) [1862] 31 Beav. 378.

(9) [1883] 34 Ch. D. 11=48 L. T. 947=31 W. R. 845.

Turning in the first place to the facts, it appears from the two letters of September 21, 1922, from the vendors' solicitors that the title-deeds or copies thereof were sent to the purchaser's solicitors on that day. This was in accordance with clause 3 of the contract of September 8, 1922. Accordingly the purchaser's solicitors must have discovered the defect in the title somewhere between September 21 and November 1, when they sent in their requisitions, Ex. F. These requisitions were with reference to the adjoining Block 'B', but by agreement were treated as being repeated as regards the suit property block 'C', the title being a common one.

The material requisitions are Nos. 1 and 3 apart from certain general requisitions of a fishing nature such as Nos. 8 and 9. Requisition No. 1 asked if plot 12 had been sold, and whether the present owner of plot 12 was bound by the cross-covenant. Requisition No. 3 stated that the suit building was a breach of the $7\frac{1}{2}$ feet covenant, and asked if the consent of the owner of plot 12 had been obtained and registered. If so, it was to be handed over on completion. If not, it must be obtained and registered. A note at the foot stated that the requisitions were sent in "subject to further requisitions arising from the papers not heretofore produced and to searches...and from the vendors' answers to these requisitions."

On November 6, the vendors answered requisition No. 1 by stating that they were not aware whether plot No. 12 had been sold, but whoever might be the owner would be bound by the cross-covenant. As regards requisition No. 3, after explaining that an open space had been left on the south instead of the west, and the reason therefor, the vendors stated that it was not necessary to obtain the consent of the owner of plot No. 12, and that no objection had been taken by him to the erection of the building.

I now turn to the correspondence, Ex. D. It is somewhat confusing that part of it (*viz.*, Ex. C to the plaint) deals with the suit property, and the rest of it (*viz.*, Exh. D to the plaint) with the adjoining block B, and that

we have no single copy of the whole correspondence before us in order of date. But dealing first with Ex. C to the plaint, the purchaser's solicitors wrote an important letter on November 7. In it they said:—

"As at present advised, our client will decline to complete the purchase unless your clients produce the written consent of the owners of the said plot to the present building having been built in contravention of the agreement with his consent duly registered. Please let us know what your clients have to say about the same."

They also asked for the conveyance of September 24, 1918, (Ex. G) to consider the vendors' answers to requisitions, and they also required production of the original title deeds of the building estate under clause 6 of the contract. The reference to Ex. G is explained by the local practice in Bombay to dispense with an abstract of title and to hand the deeds backwards and forwards according to whether requisitions have to be made or answered. The other reference may be explained by the inference that up to that time the purchaser had only seen certified copies of the earlier deeds, and not the originals, which under clauses 6 and 11 had to be produced by the vendors, but at the cost of the vendors and purchaser in equal shares.

Now stopping there, the purchaser up to this point did not exercise her right of repudiation, but on the contrary was treating the contract as subsisting, and calling on the vendors to take steps in pursuance thereof which would cause them expense.

In my opinion, therefore, it was unfair conduct on the purchaser's part to cancel the contract eleven days afterwards without any further warning, as she purported to do by her letter of November 18, and to call for the return of her deposit.

On November 20, the vendors' solicitors replied that the purchaser had no right to do this, and that they would write further after seeing their clients.

On December 4, the vendors' solicitors wrote saying that the vendors would produce the consent of the owner of plot 12 to the suit building, and asked for the draft conveyance to be sent.

Then followed on December 6 another important letter from the purchaser's solicitors, in which, after referring to their letters of November 7 and 18, they said it was useless to rely on the mere promise to produce the consent in question, and absurd to ask for the draft conveyance before such consent was produced. The letter ends:—

"In the absence of such consent and having regard to our letter of the 18th ultimo, we have stopped further investigation of title in this matter, and our client declines to do anything further till the written consent is produced. We have again to call upon your client to return the earnest money with interest."

Despite the concluding sentence, I read this letter as meaning that the contract is still subsisting, but that nothing further will be done in it till the consent is produced.

This view is borne out by the next two letters. The vendors' solicitors at once replied on December 7, saying that their client was arranging to produce the consent, and that it would be produced before completion. They also held the purchaser to her agreement, and again asked for the draft conveyance.

On December 8, the time fixed by clause 8 for completion expired.

On December 18, the purchaser's solicitors wrote saying that their client had waited for eleven days more to see whether the consent would be produced, and did not propose to wait any longer. The letter then went on:—

"We therefore hereby give notice to your clients through you that if your clients fail to procure and produce such consent and make out a marketable title free from reasonable doubt within a fortnight from date hereof that is on or before January 2, 1923, our client will put an end to the contract and treat the same as cancelled."

I draw particular attention to the final words "our client will put an end to the contract." To my mind this letter clearly showed that up to this date the contract was subsisting, and no right of repudiation finally exercised.

The vendors replied on December 19 and January 2, pointing out the unfairness of their notices at Christmas time, and the practical difficulties thereby caused. On January 11, 1923, the purchaser's solicitors wrote call-

ing for the return of the earnest money on the ground that, "the contract for sale herein now stands cancelled by reason of your client's failure to comply with the requisitions contained in our letter of December 18 last within the time thereby appointed." It will be observed that this final cancellation is based on non-compliance with the notice of December 18, and not on any alleged earlier cancellation which had only been conditionally waived.

On January 19, the vendors' solicitors wrote saying that they had arranged to obtain the consent, and they annexed the form of consent. On February 5, this consent (Ex. F) was signed by the owner of plot 12, and on February 9 it was sent to the purchaser's solicitors. It appears to have been registered on April 23, 1923. The vendors then instituted this suit on April 30, 1923.

As regards the other correspondence (Ex. D) to the plaint I need only refer to a second letter of November 18, 1922, from the purchaser's solicitors in which they refer to an interview between the respective solicitors. The precise date of that interview is not stated, and it appears from the vendor's reply of November 20 that they disputed the purchaser's version of that interview and also alleged that it was held "expressly without prejudice." So, as no oral evidence was given on the point, I leave it at that. Plaintiff's counsel relied on a letter of February 26, 1922, from the purchaser's solicitors, in which the letter said that the present position was due to the vendors' dilatoriness over the consent, inasmuch as the purchaser having insufficient monies of her own had originally arranged to raise part of the purchase-money on mortgage of the suit property, but that the intending mortgagee had got tired of waiting for the consent and declined to do anything further.

Now the view which the learned trial Judge took of the above correspondence over the suit property is this. He said:

"My view of the correspondence is that though the defendant No. 1 was ready to accept the consent of the owner of plot No. 12 with regard to the breach of the covenant as

sufficient to induce her to accept the agreement, I am not prepared to hold that there was in any sense a waiver on her part of the right which she had to put an end to the contract in virtue of the non-disclosure of this restrictive covenant. The facts which have been relied upon as constructing a waiver on her part are as stated in the letters of December 8 and 18, 1905. It is urged that she had been ready and willing to accept the consent of the owner of plot No. 13 to the existing breach of the covenant as sufficient. The correspondence disclosed that fact; but I am unable to read the correspondence as constituting a waiver on her part of the right which she had. The letter of November 18 is definite and is clearly indicative of a desire to exercise her right to rescind the contract. I do not read the subsequent letters of December 8 and 18 as waiving that right in any sense, but as giving a further opportunity to the plaintiff if the consent was obtained within fifteen days from the date of the letter of December 18 to induce her to give up her right of rescinding the contract; but as that was not done, I do not think that it could be maintained that she gave up that right."

Then further on the judgment proceeds:—

"My finding, however, on issue No. 9 is that the contract was properly put an end to by the letter of November 18, and also by the letter of January 11."

I understand the learned Judge thus to hold that there was never any waiver either absolute or conditional of the right of rescission; that the purchaser only gave the vendors a chance to induce her to change her mind by procuring the consent; that it always remained optional for her to insist on rescission whether or no the consent was obtained in due time; and that accordingly the contract was validly rescinded by her. With great respect I am unable to agree with that view of the correspondence. I read the purchaser's requisitions and letters as treating the breach of the 7½ feet covenant, as a defect in title, but one which the vendors were required to remove by obtaining the consent in question. This is, I think, clear as regards the original requisitions and the letter of November 7.

But even if a different construction was placed on the subsequent letters, what right had the purchaser suddenly to rescind the contract on November 18 in the face of her previous requisitions and letters? It cannot be justified on the ground of agreement or even acquiescence for the vendors promptly and persistently repudiated her alleged right. What right then

had she in law? Now here the judgment of Lord Parker (then Parker, J.) in *Halkett v. Dudley (Earl)* (4) is, I think, of great value. The main portion of the head-note runs:

"A purchaser's right to repudiate the contract is an equitable right arising from want of mutuality, and may be a defence to an action for specific performance; but in order to avail himself of that defence he must repudiate the contract as soon as he finds that the vendor cannot make a good title."

In that case in January 1905, there was a consent decree for specific performance and a reference to title. In February the abstract was delivered, and in April requisitions were delivered, one of which related to a restrictive covenant on a small part of the property. These requisitions were answered, and further requisitions sent and answered and repeated. On December 8, 1905, the vendor contracted for the release of the restrictive covenant. On December 22, the purchaser repudiated the sale contract for want of title. On January 4, 1906, the restrictive covenant was released. The matter afterwards came before the Judge on two summonses by the purchaser, the one to be discharged from his purchase and the other to vary the Master's Certificate of November 14, 1906, finding that a good title had been made, and that it was first shown on December 8, 1905.

Turning to the judgment, Parker, J. said.

"The purchaser puts his case in this way. He says, first, that a purchaser discovering a fatal defect in the vendor's title has a right to repudiate the contract secondly that this right is unaffected by the decree for specific performance; thirdly, that he did repudiate the contract on July 11, 1905, or at any rate on December 23, 1905, before the objection as to the restrictive covenants had been removed;... Now I think it is reasonably clear on the authorities quoted to me that, before decree, a purchaser who becomes aware of a defect in the vendor's title, which defect cannot be removed without the concurrence of a third party whose concurrence the vendor has no power to require, may (except possibly in the case of trifling matters which the Court would at the vendor's instance treat as matters of compensation or abatement of purchase-money) repudiate his contract, and that such repudiation will be a bar to any relief being subsequently given by way of specific performance at the vendor's instance, even though the defect has been removed before trial. I do not think that this right is more than an equitable right affecting the equitable remedy by way of specific performance. If a vendor contracts that he will, at a future date, con-

vey to a purchaser land which does not at the date of the contract belong to him, but to which he acquires title before the day upon which, according to the contract, the purchase is to be completed. I do not see why, in principle, he should not be able to recover damages for breach of contract if the purchaser fails to complete at the date fixed for completion. If this be so, the right of repudiation in question must be distinguished from the common law right of rescission, and arises out of that want of mutuality which, unless waived, is generally fatal to relief by way of specific performance. The point is touched on, though it is left open, in the case of *Bellamy v. Debenham* (10); and the case of *Salisbury v. Hatcher* (11), to which I will refer presently, is further material on the point; but it is in my opinion equally clear that this right of repudiation, whatever be its true nature, must be exercised, if it is to be exercised at all, as soon as the defect is ascertained. If, after ascertaining the defect, the purchaser still treats the contract as subsisting he does not retain the right to repudiate at any subsequent moment he may choose. That is, I think, the effect of the cases which were quoted to me by Mr. Upjohn, namely, *Hoggart v. Scott* (12), *Eyston v. Simonds* (13), *Salisbury v. Hatcher* (11), and *Murrell v. Goodyear* (14).

Then after dealing with the first two of these cases, and citing part of the judgment in the third case, the learned Judge says at p. 599:—

"I read that passage primarily because it appears to me to be relevant on the point as to what is the nature of this right of repudiation on which the purchaser in the present case relies, and it really points to the fact that it has nothing to do with the legal right of rescission; it is merely an equitable right arising out of want of mutuality, such as may possibly form the ground of a defence to the peculiar relief given by Courts of Equity, namely, relief by way of specific performance."

He then quotes (p. 599) the Vice-Chancellor as saying (p. 66):—

"In this state of things I am asked, on the ground of want of mutuality, to say that the plaintiff is not entitled to any relief. I should be trampling on all principle and authority, if I were to accede to such an argument. Even if the rule of mutuality, as it has been called, could be carried so far as it has been attempted to be carried in a case of this description which I do not say, still the conduct of the purchaser has been amply sufficient to exclude him from the benefit of any such argument. With full notice of the state of the title, he pursues the investigation of it, and obtains the

fulfilment of a requisition made by himself, and founded on the very state of the title. In my opinion, therefore, to relieve him from the contract would, as I have already said, be contrary to all principle and authority, and discrepant to a Court of justice."

Parker, J. then adds (p. 599):—

"It will be seen that the decision in the case, or rather the principle of the decision, rests really upon a waiver of the want of mutuality in the contract."

The learned Judge then goes on (p. 600):—

"Now assuming here that the defect of title due to the existence of the restrictive covenants was such a defect as to give rise to the right of repudiation which I have been describing, was such right exercised, or did the purchaser still continue to treat the contract as in operation? I am of opinion that no such prompt repudiation as was required on the part of the purchaser has been proved, but that, on the contrary, he continued after notice of the defect to treat the contract as subsisting, and to make requisitions and objections with a view to an inquiry as to the vendor's title which was proceeding in chambers, an inquiry which would, of course, have been wholly useless if the contract had been effectually repudiated."

"It was suggested that the purchaser repudiated the contract as early as July 11, 1905, at an interview or appointment before the Master; but even as late as November 8, 1905, we find him delivering observations on replies to the requisitions, and such observations are not expressed to be made without prejudice to some alleged prior repudiation. The first real attempt to repudiate the contract was, I think, made before the Master on December 22, 1905, when the plaintiff was in a position to compel release of the restrictive covenants, and after that the defendant took no step to give effect to the repudiation until the very end of March 1906, long before which the covenants had been released."

"It is not necessary for me to go so far as to hold that, by not repudiating promptly, the purchaser lost his right of repudiation altogether; but it seems to me that by treating the contract as subsisting after the discovery of the defect he did preclude himself from exercising a right of repudiation at a subsequent time before giving the vendor a reasonable time to cure the defect, and that thereafter his only safe course was to limit the time within which the defect must be removed and a title made out if the contract was to go through. There is no trace of any such course having been attempted in the present case. As I have said before, as late as November 8 the objection was insisted upon without repudiation, and the defect was in effect cured before the attempted repudiation on December 22 in the same year."

"Now hitherto I have assumed that the decree for specific performance did not affect the purchaser's right of repudiation; but I have come to the conclusion that, after a decree of specific performance, a defendant purchaser cannot repudiate the title or the contract without the leave of the Court."

(10) [1891] 1 Ch. 412=61 L.T. 478=39 W.R. 357=60 L.J. Ch., 166.

(11) [1842] 2 Y. & C. Ch. 54=12 L.J., Ch., 68=6 Jur. (N.S.) 1051.

(12) [1830] 1 Russ. & My. 293=Tam. 500=9 L.J., (O.C.) Ch., 54=31 R.R. 112.

(13) [1842] 1 Y. & C. Ch. 608=11 L.J., Ch., 376=6 Jur. 817.

(14) [1860] 1 De. G. F. & J. 432=29 L.J., Ch., 425=6 Jur. (N.S.) 356=2 L.T. 268=8 W.R. 398.

Now no doubt that case is distinguishable on the facts because there the defect in the title was cured or agreed so to be before the purchaser repudiated: and also the purchaser could not repudiate without the leave of the Court having regard to the consent decree for specific performance. But the principles enunciated are closely in point here: they are stated by an Equity Judge of particular eminence: and they are traced back to earlier decisions by Knight-Bruce and Turner L. J.

I need not, I think, go through all these earlier decisions. But I may cite from the judgment in *Murrell v. Goodyear* (14), which was decided in 1860. There the contract of sale was made on August 26 1858, and in his requisitions on title the purchaser required the concurrence of an heir-at-law. There at pp 449, 451 Turner L. J. said as follows:—

"But then it is said, that upon October 27 1858, notice was given to determine this contract, and that it must be treated as null and void. Now it is to be observed that, with a full knowledge of this objection to the title, the Defendant did not, in the requisitions which he made, take the objection, if she was entitled to take it, that the contract was void, upon the ground that the assignees had sold that to which they had no title. All that he said was, 'Procure me the concurrence of the heir-at-law.' He treated the contract, therefore, as a subsisting contract. I do not enter into the question whether he was or was not entitled to say that he would put an end to the contract. I am not by any means satisfied that he was. But supposing him to have been so, he treated the contract as a subsisting contract at the time when he made the requisitions upon the title; and not only so, but after discussion between the solicitors with respect to the title down to as late as October 19, 1858, this contract was treated by the defendant as a subsisting contract, and the concurrence of the heir-at-law required. . . . Then comes this question: having treated the contract as a subsisting contract down to October 19, can the Defendant, on October 23, four days afterwards, turn round and say, 'I determine this contract, and require payment back of the deposit which I have paid.' I think that every principle, and I may add, every authority, is against the existence of any such right on the part of a purchaser. The defendant was bound to afford to the vendors a reasonable time to enable them to clear the title of this difficulty which existed upon it. I think that by the effect of the letters, and by the dealing upon the contract, the Defendant had put the case in the position of an ordinary case between vendor and purchaser. Mr. Langworthy, who argued this case very ably . . . very clearly,

put the case thus:—He said, the purchaser is entitled to rescind the contract at once, upon the ground that there has been, not a fraudulent dealing by the assignees in putting up the property for sale, but an attempt by them to sell that to which they must be taken to have known they had no title—the entire fee, well, as I said before, the Defendant might, if he pleased, have set up that at the time when he sent these requisitions as to the title, but he did not do so. I do not mean to say he could have done so with success. I do not go the length Mr. Langworthy carried his argument upon that point; . . . But I say, without any hesitation, that if a purchaser has any such right as has been contended for and insisted upon on the part of this Defendant, it is a right he is bound to insist upon at the first moment; he cannot play fast and loose, and say, 'I treat this as a subsisting contract,' and then afterwards suddenly turn round and say, 'I have a right to revert to my original position. I have a right to destroy that contract, which for months, during the whole treaty of negotiation upon the title, I have treated as a subsisting contract.'

So, too, in Halsbury, Vol. XXV, at P. 403, it is stated in para 692:—

"The purchaser's right of repudiation arises as soon as the vendor's defect of title is definitely ascertained either from the abstract, or from inquiries to the purchaser's requisitions. . . . The right, however, must be exercised immediately the defect is so ascertained. If the purchaser continues in negotiation as to the title, and thus treats the contract as subsisting, he cannot repudiate at any subsequent moment he may choose, but must give the vendor a reasonable time to remedy the defect."

The English authorities on the point being then clear, is there any reason why we should adopt different principles in India? No such reason has been shown to us. On the contrary these principles seem to me to be principles of fairness and common sense. As the lawyer may say; "One cannot approbate and reprobate—at any rate at the same time." The business man may say: "You cannot sit on the fence and ask me to incur expenditure which may at your pleasure prove useless. Either rescind, or else give me a reasonable time to cure the defect."

In saying this, I do not mean that the difference that used to exist in England between remedies at law and remedies in equity are to be introduced here. But the purchaser had at least two possible remedies, viz., she could exercise her option of avoiding the contract under S. 19 of the Indian Contract Act, or have it rescinded under S. 35 of the Specific Relief Act.

But S. 19 of the Indian Contract Act also provides that instead she may insist that the contract be performed, and she be put in the position in which she would have been if the representation made had been true. This, in my opinion, she in effect did by her requisitions No. 1 and 3, and her letter of November 7. Further it is only fair to the vendors here to point out that the word "fraud" is not expressly mentioned anywhere except in the written statement. There is no express issue on it, nor does the learned Judge use that word anywhere. Nor did the purchaser give any evidence to the effect that her consent to the suit contract was caused by any fraud as is contemplated by S. 19. But for the sake of argument I have assumed here that she might have been entitled to avoid the contract under S. 19, if she had acted differently.

Accordingly in my judgment the purchaser's notice of rescission of November 18, 1922, was invalid, having regard to her previous requisitions and her letter of November 7.

This brings me to the next point, viz., whether she ever gave the vendors a reasonable time to cure the defect, and in particular was the fourteen days' notice given by her letter of December 18 a reasonable one? On this point the learned trial Judge has found in favour of the vendors. He has held that the vendors obtained this consent within a reasonable time, and that the time limited by the purchaser's letter of December 18 was unreasonable. I respectfully agree with these findings. A release or waiver of a restrictive covenant is not usually an easy concession to obtain. In the present case the vendors did not at first know who the then owner was. So the title would have to be traced and verified, to say, nothing of negotiations and possibly a pecuniary compensation. Further the Christmas and New Year holidays intervened, and according to the letter of January 2, 1923, the intermediary employed in the negotiations was out of Bombay till January 8. So, on the whole, I think the vendors did reasonably well to arrange by January 19 to obtain the consent,

and to get it actually signed by February 5. It must be remembered that in Bombay six months is a more usual time for completion than the three months under the suit contract; and also that the purchaser had originally taken some five weeks to send in her requisitions.

In any event I am clearly of opinion that the time fixed by the letter of December 18 was quite unreasonable even having regard to the time which had already elapsed since November 1. To fix such a time in Bombay during the Christmas and the New Year holidays was really illusory. Even the High Court has then its one closed holiday of the year, when all offices are shut for a fortnight. The Government offices and Banks, etc. are also closed for many days, and it is perhaps the most difficult time of the year to get any legal work done.

It follows, therefore, that in my opinion the notice of rescission of January 11, 1923, was also bad, and that issue No. 9 ought to have been answered in the negative instead of in the affirmative.

On the other hand, I agree with the learned Judge in thinking that the purchaser did not lose her right of repudiation altogether. I need not repeat the correspondence, or the observations of Lord Parker in *Halkett v. Dudley (Earl)* (4) on this point. It seems to me clear that she insisted on the consent to the building being obtained, or otherwise she would not complete the purchase. Waiver must be an intentional act with knowledge [see *Earl of Darnley v. Proprietors etc., of London Chatham and Dover Railway* (15)] and I think she never waived her right to get a good title to the building in accordance with the suit contract.

A more difficult question arises whether she did not impliedly waive her right to a release of the 7½ feet covenant as regards any future building and strips of the land to the north and south of the existing building. I cannot find that in the requisitions

(15) [1867] 36 L.J. Ch. 404—16 L.T. 217—15 W.R. 817—36 E.Q. 404.

or the correspondence or the pleadings she ever expressly raised this point. Her sole objection up to then was as regards the existing building. This may be because she thought it of no practical importance, having regard to the lay of the land to take any objection as regards the land. Nor is it at all clear whether this point was raised at the trial, although the issues are broadly framed. On the other hand, the learned Judge refers to it at the end of his judgment. Further the suit contract contains no clause obliging the purchaser to send in her requisitions within a specified time, or to accept the title subject to such requisitions.

On the whole, therefore, I think she can still force the vendors to carry their original contract, viz., to sell the property free from incumbrances, other than those expressly specified, and that accordingly the vendors must obtain, if they can, a complete release of the $7\frac{1}{2}$ feet covenant. The appellant asks that a reasonable time be given for this purpose. Under all the circumstances I think a period of three months from today would be a fair time to fix.

Next comes the question what precise order we should make, and in particular whether there should be a general reference to title, or whether the objections to title at any further hearing should be confined to the $7\frac{1}{2}$ feet covenant. I have already stated that there are no conditions binding the purchaser to furnish the requisitions within any particular time. Accordingly her counsel has cited *Lesturgeon v. Martin* (16) to show that although at one stage of the negotiations a purchaser may be willing to accept the title if a particular objection is removed, yet if there is to be a reference to the Master on title, it should be in general terms and not be confined to the particular objections. There Sir John Leach said (p. 256):—

"That objection, however, was never removed, and the voluntary assurance, given at that particular time, would not create a legal obligation upon him to relinquish in all future proceedings his original right to a marketable title. It may turn out, upon inquiry before the Master, that he had been ill-advised as to the effect of some of the objections originally

taken to the abstract, or it may turn out that there is matter destructive of the title of the plaintiff (purchaser) which did not appear upon the abstract, and the reference to the Master must therefore be general as to the title of the plaintiff."

On the other hand the requisitions here were delivered as long ago as November 1, 1922. They are mainly requisitions asking for general information, and there appears to be no objections to the title other than the one before us. In a written statement of twenty-one paragraphs there is no suggestion of any defect in the title other than this restrictive covenant. Nor are there any in the eleven issues raised at the trial, although issue No. 7 is in general terms. As to that the learned Judge says: "Apart from the defect arising out of the restrictive covenant it is clear that the marketable title of the plaintiffs is made out."

There is also a marked distinction between our practice and that prevailing in the Chancery Courts. A reference to title in the Chancery Courts is almost a matter of course in a contested specific performance action. The Court then gets the advantage of the opinion on title of one of the conveyancing counsel to the Court. Here we have no such counsel to assist the Court. The practice which has generally prevailed here up to now is I think for the question of title to be fought out at the trial. I have at times protested at that, and suggested to the parties that a preliminary reference to the Commissioner on title would probably save much time. But it not unfrequently happens that the question of title is only one of the various points in a specific performance action, and the Court is anxious to assist the parties by determining all points in dispute once and for all without a reference to the Commissioner. If, in the present case, we were to send the case to the commissioner for report on the title, it would probably only result in an additional hearing and additional delay, for one side or the other would take the matter to the Judge on objections to the report.

On the whole, therefore, I think the proper order will be to allow the appeal, and discharge the order made

in the Court below, and to remand the suit for a further hearing. Our order had better be prefaced by a declaration to the effect that the restrictive covenant in the pleadings mentioned is a material defect in the plaintiff's title, but that in the events which have happened, the defendant No. 1 has not validly rescinded the suit contract, and that the plaintiff ought to be allowed a period of three months from the date of our order in which to obtain a release of the said covenant, and that in that event she will be entitled to a decree for specific performance, but that in default of such release being so obtained the defendant will be entitled to be discharged from the suit contract, and to a return of her deposit with interest. The order should direct the suit on remand to be on board on December 1 next, and that there shall be a new issue No. 12 viz., whether the plaintiff has obtained a release of the restrictive covenant in the pleadings referred to and if so at what date. The remand will be heard on the footing that issues Nos. 4, 7, 8, 9 and 11 have been answered in the negative, and issues Nos. 2, 3 and 6 in the affirmative. Issues 5, 10 and 12 will then remain for final determination, and it will be for the trial Judge to decide what decree should then be passed. That *prima facie* will depend upon the answer to this additional issue No. 12. We might, as in the Chancery Court, pass now a decree for specific performance, but I think this might be open to misconstruction in this Court, and that accordingly the order I propose is better suited to local practice.

As regards the present ownership of plot 12, it must be taken that S. D. Davar, named in the consent Ex. F dated February 5, 1923, was the owner of plot 12 at the date of Ex. F. This was pleaded in para 12 of of the plaint and not disputed in the written statement or at the trial.

As regards costs, I think on the whole that the costs up to date of each party, including the costs of this appeal, should be costs in the cause. Minutes of this order are to be shown to us within ten days.

Kincaid, J.-I agree. *Appeal allowed.*

★ 1925 BOMBAY 96

MACLEOD, C. J. AND CRUMP J.

The Bombay Baroda Central India Rly. Company—Applicants.

v.

Sukhadia Shankaralal Jagjiwandas—Opposite Party.

Civil Rev. Application No. 335 of 1922 Decided on 5th April 1923 from the decree of the first class Sub. Judge Nadiad in Small Cause Suit No. 174 of 1922.

Railways' Act, S. 76—Risk note executed—S. 76 does not apply.

Where the consignor has signed a risk note in the usual form, he must prove that there had been a loss of one or more complete packages out of the consignment and that the loss was due to the wilful neglect of the Ry. Company or its servants. [P. 96, C. 2.]

Campbell and Crawford Bayley & Co.—for Applicant.

M. K. Desai—for Opposite Party.

Judgment.—The plaintiff sued to recover the price of goods short delivered by the defendant Company. The claim was decreed by the First Class Subordinate Judge in the Small Cause Court, suit No. 174 of 1922, at Nadiad. The plaintiff had signed a risk note in the usual form, and he has not even proved that there had been a loss of one or more complete packages out of the consignment of 63 bags of Sugar. That would be sufficient to dispose of the suit. But beyond that, even supposing one or more complete packages had been missing and not delivered, still the plaintiff would have to show that the loss was due to the wilful neglect of the Ry. Co., or its servants. But the Judge has completely misunderstood the nature of the case, as he said that the burden was on the defendant to show how the loss had arisen or could have arisen. The contract between the parties is contained in the Risk Note and S. 76 of the Indian Railway's Act has no application.

The Rule therefore must be made absolute and the Plaintiff's suit must be dismissed with costs throughout.

Suit dismissed

★ ★ 1925 BOMBAY. 97

TARAPOREWALA, J.

Rosa Fernandez—Plaintiff.

v.

Joseph Gonsalves—Defendant.

O. C. J. Suit No. 3770 of 1921,
Decided on 14th July 1924.

★ ★ Contract-Minor's rights to enforce contract of marriage-Minor

Contract made by the natural guardian of a minor so as to be binding on the minor, which is for the minor's benefit, is enforceable at law. [P. 99 C. 1]

Minor can maintain suit for damages for breach of contract of marriage entered into on minor's behalf by the minor's natural guardian. Case law discussed. [103 C. 2]

Poonawala—for Plaintiff.

Judah—for Defendant.

Judgment—This suit has been filed by the plaintiff, who has now attained majority, for recovering damages for breach of contract of marriage made by the defendant with her and her father. There is no dispute as to the facts in the case, and although the defendant's counsel in his cross-examination tried to elicit facts with a view to show that the contract of marriage was by mutual consent cancelled and abandoned, the defendant has not ventured to go into the witness-box or lead any evidence to substantiate the said allegation. I therefore, take it that the contract of marriage, which is admitted by the defendant, was subsisting at the date the defendant admittedly married another lady in the year 1921 and that he has committed a breach of the contract. The defendant's counsel, however, has taken up a point which, if decided in defendant's favour goes to the very root of the case. The point is that the contract in suit was either made by the defendant with the plaintiff or by the defendant with the plaintiffs' father, that if it was made by the defendant with the plaintiff, the contract is void as having been made with a minor, on the authority of *Mohori Bibee v. Dharmolas Ghose* (1) and on the other hand, if the contract was made by the defendant with the plaintiff's father, the plaintiff cannot maintain the suit, she not being a party to the contract. If either of

the points is decided in favour of the defendant, the suit will necessarily fail.

Now, as to how the contract was entered into, there is no doubt in my mind that the contract was entered into by the defendant with the plaintiff's father as a guardian of the plaintiff. No doubt the plaintiff was a consenting party; but she could not herself enter into the contract she being then only about thirteen years of age. The facts proved as to the making of the contract are as follows:—The Plaintiff's father and the defendant were employed in the docks and thus the defendant came to know the plaintiff. He asked the plaintiffs' father to give the plaintiff in marriage to him and he also asked the plaintiff to marry him. Both plaintiff and plaintiff's father agreed. This was about a month or so before the writing of May 25, 1919, passed by the defendant. It appears that on that day the defendant desired that the plaintiff should go out with him as his fiancée. The plaintiff's father objected. Thereupon the defendant passed the writing, which has been put in as Exh. A, whereby he agreed to marry the plaintiff within two years and to pay Rs. 2,000 by way of damages if he failed to do so. He gave the said writing to the plaintiff's father as the natural guardian of the plaintiff, and the plaintiff's father thereupon allowed the plaintiff to go out with the defendant as desired by him. Upon these facts I hold that a contract of marriage was entered into between the defendant on the one hand, and the plaintiff's father on the other acting as guardian of the plaintiff and on her behalf.

The next question for consideration is whether the father can enter into such a contract as guardian of the minor on her behalf so as to bind her and whether such a contract is for the benefit of the minor. Both here and in England many contracts for marriage are made while one of the parties is minor. In England the question arose as to whether in a case where one of the contracting parties was a minor the minor could claim damages for breach of such a contract.

(1) [1903] 3 Cal. 539=30 I. A. 114=7 O.W.N. 441=5 Bom. L. R. 421=8 Sar 374 (P. O.)

The question was decided in *Holt v. Ward* (2) and that is good law until now. The Court had there no difficulty in arriving at that conclusion because in England the contracts of minor at that date were held under common law to be voidable and not void, that is to say, the minor could enforce performance of the contract as against the other adult party but the adult party could not enforce it against the minor. Thereafter the Infant's Relief Act of 1874 was passed which made certain contracts by minor mentioned therein void. That Act, however, left contracts of marriage untouched, and, therefore even today in England, contracts for marriage made by a minor are voidable and not void. In India up to the decision of the Privy Council in *Mohori Bibee v. Dharmodas Ghose* (1) although with some conflict, it was held that the contracts of minors were voidable. If that had been the state of law, there would have been no difficulty whatsoever in this case, but on the wording of the Indian Contract Act, their Lordships of the Privy Council held that all contracts of minors were void and not merely voidable. The question there was a contract entered in to by the minor himself, it was a contract with regard to property. Whether their Lordships of the Privy Council would have applied the same principle to a contract of marriage is to my mind very doubtful; and, so far as I am concerned, unless there is an authority on the point which is absolutely binding on me, I am not prepared to hold that the contract of marriage made on behalf of a minor by a person who is the natural guardian of the minor and who is the only person who could enter into such a contract, is void. The principle on which I hold the contract in this case valid is the principle which has been laid down subsequent to the Privy Council decision in cases where the Courts in India have tried to give the force of contract to agreement made by the guardian of minor on his behalf, where the guardian has power to enter into such agreement so as to bind the minor and the agreement is for the minor's benefit.

(2) [1732] 2 Starn. 937

There are other cases in which the Courts in India have tried to enforce the contract of an adult party with a minor against the adult party where the consideration proceeding from the minor has been completely executed and nothing has been left to be done by the minor and the only thing left is the performance of the contract by the adult party. Mr. Justice Srinivasa Ayyangar in *Raghava Chariar v. Srinivasa Raghava Chariar* (3) enunciates that principle. I may say at once that there is no question here of the minor having carried out her part of the contract and the only part remaining to be carried out being the promise on the part of the adult party. The promise of the defendant to marry had still to be carried out so that at the date of the suit there was the promise of the plaintiff which was executory and not executed. Mr. Poonawalla, however, referred me to certain observations at page 324 of that report to be found in the judgment of Mr. Justice Srinivasa Ayyangar which are to the effect that "where consideration moves from a third party, there can scarcely be any doubt that a promise made to a minor by an adult would be enforceable by him." And as an example, he says:—

"If a father gives consideration and requires the promisor to pay money or do some other thing for the benefit of his minor son, the minor son can enforce that promise."

Further on he says:—

"Where the consideration for the promise of the adult is a promise by the minor, inasmuch as the minor cannot make a promise enforceable in law, the consideration necessarily fails, and if, however, at the time when the promise of the adult is sought to be enforced by the minor, the minor has performed his promise and that performance has been accepted by the adult, I should hold that the minor can enforce the promise."

It is not necessary for me for the purposes of this case to express my assent to or dissent from the said observations of Mr. Justice Srinivasa Ayyangar but, in view of the decision of the Privy Council in *Mohori Bibee v. Dharmodas Ghose* (1), it appears to me doubtful whether, even where the promise of the minor is performed by

(3) [1916] 40 Mad. 308 = 31 M. L. J. 575 = 2 M. L. T. 407 = 36 I. C. 921 = (1916) 2 M. W. N. 363 (F. B.)

him the agreement of the minor can be held to be a contract enforceable at law so far as the adult party is concerned. As to the consideration proceeding from the adult enabling the minor to sue, there is no doubt that in this case the main consideration proceeds from the minor even though the consent to the marriage by the father is held to be a part of the consideration. The case, therefore, can only fall under the principle first stated by me, namely, that where a contract is made by a guardian of the minor so as to be binding on the minor and which is for the benefit of the minor there is an enforceable contract in law and the minor can enforce it. I must say that the decisions in England are more favourable to a minor inasmuch as the minor is held to be entitled to sue the adult party on a breach of promise of marriage while mutuality is denied to the adult party so that the adult party cannot sue the minor on a breach of the contract by the minor, and under the Infant's Relief Act of 1874, I find the legislature has gone so far to protect the infants that it has by S. 2 enacted that in the case of any contract by a minor, it cannot be ratified by the minor on attaining majority. It was so held in *Coxhead v. Mullis* (4). The position in India would be different as, on the authority of the decision of the Privy Council in *Mohori Bibee v. Dharmodas Ghose*, (1) I cannot hold that the contract is only voidable where it is made by the guardian for the benefit of the minor so as to bind the minor and that therefore the minor can sue on such a contract but cannot be sued on it. But that is a result which in my opinion does not justify me in refusing the partial relief which I can give to the minor plaintiff in the suit, namely, to hold that the contract of marriage made by the natural guardian is binding on the minor and is for the minor's benefit and is therefore a contract enforceable by both parties.

Now, as to the guardian having powers to make a contract binding on the minor, there is a decision of the Privy Council in *Mir Sarwarjan v.*

Fakhruddin Mahomed Chowdhuri (5). There the contract was for the purchase of immovable property on account of the minor. Their Lordships of the Privy Council held that neither the manager of the minor's estate nor the minor's guardian had any authority to make such a contract so as to bind the minor or the minor's estate. That case deals only with the minor's right in property which in my opinion the minor would be as eligible to exercise after he attained majority and which need not necessarily be exercised during his minority by any person on his behalf. There might be instances where it would be beneficial to the estate of the minor to sell his property or to invest his moneys in the purchase of property. In such a case the adult person, who takes an interest in the minor, can have himself appointed statutory guardian of the minor and with the sanction of the Court can do the acts necessary for the benefit of the minor. In my opinion the question of marriage is quite different from the question of an interest in property, particularly in this country, as every one knows marriages take place in most cases before the attainment of majority especially by girls. It is considered in this country a sacred and essential duty of the parents and guardians, particularly of girls, to see that they are settled down in life by proper marriage. It is only recently that we find ladies, and that too only among the advanced communities, taking to the learned professions. However, if the opinion of the majority in this country is considered it will be that ladies should get married and be settled in life and discharge the duties of wife and mother which are in their opinion as essential to the well-being of the community as the duties which are performed by males and which are now in rare cases performed by females. It may be stated that the parties here are Native Christians or Goans. The girl is a Goan Roman Catholic and the defendant is an East Indian Roman Catholic. Both

(4) [1878] 3 O.P.D. 33—17 L.J., O.P. 761—39 L.T. 349—27 W.R. 136

(5) [1911] 39 Cal. —232—33 I.A. 1—16 O.W.N. 74—(1912) M. W. N. 22—9 A.L.J. 33—15 O.L.J. 69—14 Bom. L.R. 5—21 M.L.J. 156—13 I.O. 331—11 M.L.T. 8 (P.C.)

are converts from Hinduism and, as is well-known in these Courts, the converts still observe many of the customs of the Hindus, and in some cases even the caste distinctions which prevail among the Hindus. Although the Goans were converted to Christianity hundreds of years ago, so far as customs, manners and habits are concerned, they still follow those of their Hindu ancestors, and among them marriage is considered to be the primary duty of the parents of a girl. If, therefore, the Courts were to hold that parents of girls cannot make binding contracts on their behalf, in my opinion it would lead to very great hardship and it would really be going against the customs, the manners and the habits of the people. I consider these Indian Christians and Goans, so far as the duty of making contract of marriage is concerned, on the same footing as Hindus or Mahomedans and other communities in India, and on that footing come to the conclusion that it is the duty of the parents to make a contract of marriage for their daughter, and that, therefore, they can make a binding contract on behalf of their daughters.

The second essential, as I have pointed out, is that the contract should be for the benefit of the minor, and that point I find was discussed in the case of *Holt v. Ward*, (2) and even the Judges in England came to the conclusion that marriage was for the benefit of the minor. There is no question that in India it would be considered to be for the benefit of the minor. The principle which I have just enunciated is stated in Pollock and Mulla's Indian Contract Act at p. 75 under the heading of "Specific Performance," Mr. Judah for the defendant contended that the observations of the learned authors at that page refer only to immovable property as they are put under the heading of "Specific Performance." I do not agree with Mr. Judah. The principle is the same whether the contract is in respect of immovable property or in any other respect. Specific performance is merely a relief and not the cause of action; the cause of action is the breach of the contract. In some cases there may be a relief by

specific performance and in others there may not be; and it is in the discretion of the Court whether to give relief by way of specific performance or not. The principle, therefore to my mind is the same whether we apply it to contracts in respect of immovable property or other contracts. The principle which the Court has to consider is this: has the guardian power to enter into the contract on behalf of the minor so as to bind the minor; and, secondly, whether the Contract is for the benefit of the minor. If either of the two essentials is wanting, there would not be a contract enforceable at law, and if both these essentials are present, it would be a contract enforceable at law. By this decision I make the contract binding on the minor which is not done in England. But to my mind, considering the difference between the social customs and manners of people in England and in this country, there is much less hardship and much less harm in my holding that the natural guardian of a minor is entitled to make a contract of marriage binding on the minor than to hold otherwise; as to hold otherwise would mean that no one could make a contract of marriage for his minor daughter for fear that the other party may at any time put an end to it without incurring any liability. The breach of a promise of marriage has much more serious consequences in India in the case of girls inasmuch as the chance of the girl making another good match are seriously affected. I for my part am not disposed to read that result in the Privy Council judgment. In my opinion it would be revolutionizing the manners and customs of the people here if I were to hold that a contract of marriage could not be entered into by a natural guardian for a minor girl, I may here refer to a decision of a single Judge of this Court, Mr. Justice Kemp, in *Abdul Razak v. Mahomed Hussein* (6). It is the decision of a single Judge and is therefore not binding on me. There the suit was filed against the father of the girl claiming damages for breach of a contract of marriage entered into by

(6) [1916] 42 Bom. 499 = 38 L. C. 771 = 19 Bom. L. R. 164.

the father of the girl with the plaintiff. The parties there were Mahomedans and there was no question of a minor suing in that case. The claim was made by the plaintiff against the father of the minor defendant and the only question discussed there was whether any damages could be awarded to the plaintiff on the same footing as they are awarded in England on a breach of a contract of marriage. An issue was raised as to whether a suit for a breach of promise of marriage could lie under Mahomedan law, and that was decided in favour of plaintiff. On the question of damages Mr. Justice Kemp came to the conclusion that the two contracts were so different in their nature that the principles applicable in assessing damages to a breach of a contract of marriage entered into between the father of the minor girl with the other major party would be quite different from the principles applicable to the case of a breach of marriage in England, although he held that all consequential damages, if proved under S. 75 of the Indian Contract Act to flow as the ordinary result from the breach, would be recoverable by the plaintiff. I do not agree with Mr. Justice Kemp if he meant to hold that no damages are ordinarily suffered by the wronged party on a breach of contract of marriage among Mahomedans or other Indian communities in their position. As I have stated the harm is greater to the girl in the Indian communities than to an European female, and if such breaches are allowed to be made without any penalty, either on the ground that there is no enforceable contract or that there are no damages, the consequences would be very serious so far as minor females are concerned.

There is a decision of the Privy Council in *Khwaja Muhammad Khan v. Husaini Begam* (7) which has some bearing on the point in question. There also the parties were Mahomedans. The suit was brought by the plaintiff who at the time of the contract was a minor for enforcing a

contract entered into between the defendant and the father of the plaintiff: and the question was raised as to whether the plaintiff, who was not a party to the contract, could maintain the suit. Their Lordships of the Privy Council differentiated the decision in *Tweddle v. Atkinson* (8) and held, on the facts of the case, that a charge having been created on the immovable property in favour of the plaintiff, the plaintiff was entitled as the party in whose favour the charge was created to maintain the suit. That is on the principle, which is well-recognised in English law, that if under a contract a trust is created in favour of a party who is not a party to the contract, such party can enforce the benefit under the contract as a *cestui que trust*. The decision in this case, therefore, cannot be of any help to the plaintiff. The observations of their Lordships, however, at p. 413, are important in so far as they support the conclusion at which I have arrived that in this country marriages are contracted for minors by parents and guardians and that they are so validly contracted. Their Lordships observe as follows (p. 413):—

“Their Lordships desire to observe that in India and among communities circumstanced as the Muhamadans, among whom marriages are contracted for minors by parents and guardians, it might occasion injustice if the common law doctrine was applied to agreements or arrangements entered into in connection with such contracts.”

The common law doctrine here referred to is that laid down in *Tweddle v. Atkinson* (8), namely, that a stranger to the consideration of a promise cannot maintain the suit on the contract.

Mr. Judah, for the defendant, referred to *Dunlop Pneumatic Tyre Company, Limited v. Selfridge and Company Limited* (9) in support of his contention that a stranger to the consideration of a contract cannot maintain the suit. The question has been fully discussed in Pollock & Mulla's Indian Contract Act at pages 19 to 25 and, besides the judgment of the Privy Council, there is the authority of a Division Bench of the Court in the

(7) [1910] 32 All. 410=14 C.W.N. 165=7 A.L.J. 871=8 M.L.T. 147=12 Bom. L.R. 638=12 C.L.J. 205=7 L.C. 237=20 M.L.J. 614 (P.C.)

(8) [1861] 1 B. & S. 393=30 L.J.Q.B. 267=8 Jur. (N.S.) 332=4 L.T. 468=9 W.R. 781.
(9) [1915] A.C. 847=81 L.J.K.B. 1630=113 L.T. 386=59 S.J. 439=31 T.L.R. 399.

case of *Shankar Vishvanath v. Umabai* (10), which decision is binding on me, to the effect that a person who is not a party to the contract cannot maintain a suit on the contract. It appears from the notes of the learned authors that an attempt was made by the Madras High Court to get round the decision in *Tweddale v. Atkinson* (8) and to follow an older judgment in *Dutton v. Poole* (11). But the later decisions clearly show that that attempt had nothad the approval of the Courts in India in subsequent cases. As there is a judgment of this Court binding on me, I need not go into the question any further.

There is one more Bombay decision to which I should like to refer and that is *Purshotamdas Tribhovandas v. Purshotamdas Mangaldas* (12). That decision was given before the decision of the Privy Council in *Mohori Bibee's case*. The principle, however, on which that decision proceeds is not, in my opinion, affected by the judgment of the Privy Council. The only difficulty that I have felt all along is whether the principle applied in the case of Hindus by the Courts, viz., that the natural guardian can enter into a contract of marriage on behalf of a minor, can be applied to the Goans and the Indian Christians. Mr. Justice Candy held in that case that if the father of a minor girl entered into a contract of marriage on behalf of the minor he could not plead in defence of a suit for damages for breach of that contract that the minor girl was unwilling to marry the plaintiff and that he could not force the minor girl to marry and that the contract was impossible of performance and therefore he could not be held liable in damages. I find some very useful observations in that case at page 33 which go to support my conclusion in this case. Mr. Justice Candy there considers contracts made in England by fathers on behalf of their minor sons of apprenticeship and he says —

"A contract of a father to give his daughter in marriage is analogous to the contract

of a father apprenticing his son and binding himself for the performance by his son of all and every covenant on his part."

Then further on he says that in those contracts excepting where the Court finds on the facts that the contract was impossible of performance the contract was held to be binding on the father and that the father could not claim to be relieved from his obligation on the ground that the son or ward was unwilling to serve as contracted.

The question there considered was not the liability of the minor but of the father. But what I am concerned with here is the well recognized principle that the father can enter into a binding contract for the benefit of his minor child which contract is enforceable at law. A contract for apprenticeship is held to be good because it is considered to be for the benefit of the minor; in the same way a contract of marriage is for the benefit of the minor, and I see no reason why a father should not be held to have power to make a contract of marriage on behalf of his minor child. I have not been able to find in the English reports a single case where the father has entered into a contract of marriage on behalf of his minor child. However to my mind in India the Court would be justified in applying the principles of contracts of apprenticeship in England in so far as to hold that the contract of marriage in India stands on the same footing as being one for the benefit of the minor and being one which the father can enter into on behalf of the minor. Nither a contract of personal service nor a contract of marriage can be ordered to be specifically performed so that in either case the apprentice or the girl cannot be compelled to carry out his or her part of a contract against his or her wishes. However, if it is an enforceable contract, the other result, namely, the liability in damages of the party making the breach of the contract, would follow. It may be that in the case of a minor that liability may have to be satisfied by the natural guardian or father of the minor plaintiff, and the Court may come to the conclusion that the minor plaintiff should not be ordered

(10) [1913] 37 Bom. 471=19 I. C. 736=15 Bom. L. R. 320.

(11) [1688] 2 Lev. 210.

(12) [1896] 21 Bom. 23.

to pay out of his or her own estate anything to the other party by way of damages. However, I need not go further into other contingencies and complications which might arise as a result of this decision. I am quite content to decide on the facts of this case and to my mind it would be a denial of justice if the defendant after the conduct on his part as proved in the case, viz, moving about with the plaintiff as his *fiancee* for two years, should be allowed to break the contract with impunity and without having to pay damages for his wrongful act.

There are two more cases to which I would refer and one of them is directly in point namely, *Muhammad Omar v. Bulha* (13). There also it seems the learned Judge felt the same difficulty and hardship and he came to the conclusion, in my humble opinion rightly, that the minor was entitled to maintain the suit for damages for breach of a contract of marriage made by the minor's father during his or her minority. The learned Judge has relied in support of his conclusion on a judgment of the Punjab Chief Court in *Daropti v. Jaspat Rai* (14). That case was not a case of a minor but the case of a party who was not a party to the contract suing on the contract and the learned Judges there tried to get round the decision in *Tweddle v. Atkinson* (8) in a very ingenious manner different from the attempt made by the Madras High Court to which Pollock & Mulla have referred in their commentary already mentioned by me. I cannot, however, follow the judgment of the Punjab Court in *Daropti v. Jaspat Rai* (14) because a Division Bench of this Court has decided that a person who is not a party to the contract cannot maintain a suit. The Punjab Chief Court held that the suit was maintainable on the ground that contrary to the principle of English Common law, "consideration," as defined in the Indian Contract Act, need not proceed from the promisee, but may proceed from a third person, and that the consideration in the suit had pro-

ceeded partly from the promisee and partly from the third party who had sued on the contract, and that therefore the principle in *Tweddle v. Atkinson* (8) which laid down that a stranger to the consideration could not sue on the contract, could not apply as the plaintiff was not a stranger to the consideration. The decision in *Muhammad Omar v. Bulha* (13) is not merely based on the principle laid down in *Daropti v. Jaspat Rai* (14). The learned Judge tried to get support for his conclusion from the said judgment. Even though that support is not available to me, I can rely on the reasoning in *Mahammud Omar v. Bulha* (13) that in this country contracts for marriage of minors are entered into by parents or guardians and it would be a great hardship and denial of justice if such contracts were held to be absolutely void so as to deprive the minors of any relief in respect of them. On all these considerations I find that this suit is maintainable by the plaintiff and that she is entitled to claim damages for breach of contract of marriage in this suit.

As to the quantum of damages, in England the question is one solely for the decision of the jury. I am here acting in that capacity. In these breaches of contracts various facts have to be considered. As stated in Halsbury's Laws of England Vol. XVI, page 277:—

"The damages in an action for breach of promise of marriage are not measurable by any fixed standard, and are almost entirely in the discretion of the jury. The injury to the affections of the plaintiff, the prejudice to his or her future life and prospects of marriage, the rank and condition of the parties and the defendant's means, are all matters to be taken into consideration."

Leaving aside the question of injury to the affections of the plaintiff in this case, I do hold that the fact that the defendant went about with the plaintiff as his *fiancee* for about a period of two years, when she was between thirteen and fifteen years of age, must prejudice seriously her future life and prospects of marriage. Mr. Judah tried to contend that the plaintiff was too young to be affected by the fact of defendant going about with her. In my opinion in this country where girls attain puberty at

(13) [1909] 3 P. R. 1909=9 P. W. W 1909=I. O. 393=23 P. L. R. 1909.

(14) [1904] 49 P. R. 1905=28 P. L. R. 1905.

a very early age, i.e., thirteen to fourteen, it cannot be seriously contended that the plaintiff was a mere child. She was sufficiently grown up to understand very well what marriage meant to her. I have also taken into consideration the fact that probably in the community of the plaintiff there would not be many eligible husbands of the means and position of the defendant. The evidence as to the defendant's means, which is not contradicted, is that the defendant is earning about Rs. 200 to 300 per month. I have on the other hand taken into consideration the fact that the defendant quarrelled with the plaintiff's parents and that he was prohibited from entering the house where plaintiff lived and that social relations ceased between the two families. The plaintiff's father and mother said in their evidence that they knew that the defendant was still meeting the plaintiff outside the house and they allowed it in the belief and hope that the defendant would marry the plaintiff as promised by him. The version of the plaintiff's father and mother as to the origin of the quarrel, viz., that it was due to defendant wrongfully asking for the return of the writing given by him, is not contradicted. So far as the plaintiff is concerned I do not see why her right to claim damages should be prejudiced to any appreciable extent by reason of the quarrel between the defendant and the plaintiff's parents.

There is one more point to be considered on the question of damages. The writing given by the defendant says that if he did not marry the plaintiff within two years, he would pay Rs. 2,000 by way of damages. If that amount was payable to the father the stipulation would certainly be void, but the amount is in my opinion clearly payable to the plaintiff as damages under the said writing.

The question whether the damages therein mentioned are a penalty or not does not arise in view of S. 74. Whether the sum is a penalty or the liquidated amount mentioned as payable in the case of a breach of contract, I have to decide on the facts

what damages the plaintiff has suffered. If they do not amount to the sum mentioned in the agreement whether it be by way of penalty or not, the plaintiff is not entitled to recover the same. Considering all the facts and further considering that this is the first case of its kind, so far as I know in Bombay, I think the ends of justice would be met by allowing the sum of Rs. 1,000 as damages to the plaintiff with costs.

I also order that all the Court fees payable by the plaintiff shall be paid by the defendant.

Suit decreed.

1925 BOMBAY 104

MARTEN AND FAWCETT, JJ.

Shriram Shambhudayal—In Re.

Criminal Application for Revision No. 280 of 1924, Decided on 17th September 1924, against an order by Ag. Chief Presidency Magistrate of Bombay.

Criminal P.C., S. 10 (1) and S. 3 (6)—Magistrate has power to grant bail to accused who has been arrested under S. 54 (7) and whom, the Magistrate has been asked by the magistrate of a native state to retain in custody. If the arrest is under S. 33 (g) but other facts remain the same, the same rule applies—Extradition Act, S. 28—Criminal P.C., S. 33 (g)—Criminal P.C., S. 54 (7)

Magistrate has power to grant bail to an accused who has been arrested in pursuance of S. 54 (7) of the Criminal P.C., whom, he has been asked to retain in custody, by the Dt. Magistrate of a Native State. [P 105 C 1]

Per Fawcett, J.—As S. 54 (7) does not apply to arrests in Bombay, when the accused is arrested without warrant in Bombay, he must be deemed to have been arrested under S. 33 (g). But even in such a case, under S. 33 of the Extradition Act, the Magistrate has power to grant bail. [P 105 C 2]

P. N. Golinho—for Applicant.

Marten, J.—The sole point before us is whether the learned Magistrate was right in thinking that the application of the accused for bail could not be entertained by him as he was "directed to retain the accused in custody pending the extradition proceedings as per Ex. A." The proceedings in question against the accused are under the Indian Extradition Act XV of 1903 in respect of an alleged criminal breach of trust committed in the State of Indore. With

the facts of that case we are not now concerned, and many of the allegations in the petition before us are for present purposes wholly irrelevant.

It is said that the accused has been arrested without an order from the Magistrate and without a warrant in pursuance of the provisions of S. 54 (7) of the Criminal Procedure Code. Consequently S. 23 of the Indian Extradition Act 1903 applies under which such a person

"May, under the orders of a Magistrate within the local limits of whose jurisdiction such arrest was made, be detained in the same manner and subject to the same restrictions as a person arrested on a warrant issued by such Magistrate under S. 10."

Then if one turns to S. 10, it gives power to a Magistrate to issue a warrant of arrest in certain cases, and then enacts in Sub S. (4) that

"In the case of a person arrested or detained under this section, the provisions of the Code of Criminal Procedure for the time being in force relating to bail shall apply in the same manner as if such person were accused of committing in British India the offence with which he is charged."

In other words Ss. 23 and 10 (4) enable the Magistrate to grant bail.

It is accordingly important to bear in mind that this is not a case under S. 3 where a requisition has been made to the Government of India or to any local Government by the Government of any Foreign State for the surrender of a fugitive criminal of that State. In such a case S. 3, sub-section (5), provides for bail.

"If the Magistrate is of opinion that a *prima facie* case is not made out in support of the requisition, or if the case is one which is bailable under the provisions of the Code of Criminal Procedure."

The learned Magistrate appears to have been of opinion that because the telegrams or letters from the District Magistrate of Indore asked him to detain the accused in custody, therefore he could not entertain any application for bail. But we think, having regard to the sections which I have just alluded to, and in particular to S. 10 (4), that the learned Magistrate had jurisdiction to entertain an application for bail.

Accordingly we think that the proper course is to remit the application for bail to the learned Magistrate with the above intimation of our opinion as to his legal powers. It will be then

for him to consider the application for bail on its merits.

The matter being urgent we will direct the Registrar to forward the papers to the Magistrate with all convenient speed and if possible to-day.

Fawcett, J.—I concur. I would only add that, as the petitioner was arrested in the City of Bombay, it may be said that he was not arrested in pursuance of the provisions of S. 54, Cl. (7), of the Criminal Procedure Code of 1898 within the meaning of S. 23 of the Indian Extradition Act XV of 1903. Under S. 1 of the Criminal Procedure Code that particular S. 54 does not extend to the police in the town of Bombay. The accused was, therefore really arrested without a warrant in pursuance of the powers given by S. 33, Cl. (g), of the Bombay City Police Act, 1902. That section reproduces practically word for word the provisions of S. 54, and Cl. (g) that I have referred to is exactly in the same words as clause (7) of S. 54 of the Code.

It is probable that the fact of S. 54 of the Code not applying to the town of Bombay was overlooked by the Legislature when the Indian Extradition Act XV of 1903 was passed. And under the general rule of interpreting a statute when possible so as to give effect to its intent and spirit, I think we are clearly justified in holding that S. 23 of the Indian Extradition Act covers the case of an arrest under S. 33, Cl. (g), of the Bombay City Police Act.

Order accordingly.

★ ★ 1925 BOMBAY 105

SHAH, Ag. O. J. AND FAWCETT, J.

F. A. C. Rebello and others—Plaintiffs—Appellants.

v.

Co-operative Navigation & Trading Co., Ltd.—Defendants—Respondents.

O. C. J. Appeal No. 2 of 1924, in Suit No. 1945 of 1923, Decided on 11th July 1924.

(a) *Civil P. C., O. 17, R. 1*—When notice for the discovery of documents has been posted to the hearing of the suit, but on the day so fixed, no judgment is given on the notice, adjournment of hearing of the suit may be refused.

Where a notice as to inspection and discovery of documents is adjourned to the hearing of the suit, though no judgment is given on the notice, the Court may proceed with the suit on the day fixed for hearing and refuse further adjournment especially where the nature of the case requires the avoidance of delay. [P. 108 C. 1]

(b) *Company—Meeting—Amendment—Rejection is proper of contrary to Court's order.*

Amendment may be rejected if it is contrary to the terms of the order of the Court, under which the meeting takes place, or if it is an integral amendment naming four persons as substitutes for the four persons mentioned in the principal resolution for certain offices and three out of the four persons, mentioned in the amendment, intimate that they decline to accept the offices. [P. 108 C. 2]

* (c) *Company—Meeting—Minutes are prima facie though, not conclusive, evidence of proceedings—Chairman's declaration of the result of polls will be presumed to be correct until the contrary is proved. Also, when meeting is held and chairman acts under orders of Court, Court has some control as to evidence attacking the validity of the proceeding.*

The minutes in the books are to be received though not as conclusive, yet, as *prima facie* evidence of resolution and proceedings at general meetings; inasmuch as the chairman who presides at such meetings, and has to receive the poll and declare its result, has *prima facie* authority to decide all emergent questions which necessarily require decision at the time, his decision of those questions will naturally govern, and properly govern the entry of the minutes in the book; and though in no sense conclusive, it throws the burden of proof upon the other side, who may say, contrary to the entry in the minute-book, following the decision of the chairman, that the result of the poll was different from that there recorded. This principle all the more applies where a meeting is held and the chairman acts under the order of a Court.

[P. 109 C. 2]

Per Fawcett, J.—If the meeting had been held under the Court's orders and under the chairmanship of an officer appointed by the Court specially for that purpose, the result cannot be attacked as freely as otherwise. The case is like that of report of a commissioner for a local investigation calling under Order XXVI, rule 10, Civil Procedure Code, and although that particular rule does not in terms cover the present case, it does afford an useful guide as to the situation arising. The adducing of evidence in regard to objections to a commissioner's report is subject to the discretion of the Court. The Court has therefore, a certain control as to the kind and amount of evidence that should be allowed to be adduced in regard to the objection taken to the result of the voting as reported by the Chairman.

[P. 111 C. 1, 2]

* (d) *Company—Meeting—Validity of Votes—Plaintiff disputing validity can claim inspection and discovery of documents—But refusal of inspection is not wrong so as to merit reversal by superior Court, where delay is bad and where inspection is not likely to benefit plaintiff—Civil P. C., O. 11 R. 12—Civil P. C. S. 99*

When the plaintiff disputes the validity of the votes recorded in a meeting, he is entitled to inspection of the documents concerned. But when such inspection will cause delay which the nature of the case will not permit and when the plaintiffs do not show that the inspection would yield any result in their favour, refusal of inspection is not wrong so as to merit reversal by the superior Court. The restrictions in England in regard to the inspection of ballot papers in elections both to the House of Commons and in regard to Municipal elections, show there are some considerations against a free right of inspection of voting papers in a case like the present, though those restrictions being statutory, cannot apply in India. [P. 110, C. 1; P. 112 C. 2]

(e) *Company—Meeting—Closing doors during taking of poll—Chairman is justified if special precautions are necessary.*

The chairman is justified in closing the doors during the taking of the poll if it is not an ordinary meeting of a company, but a meeting in which special precautions have to be taken in view of the rivalry between two groups. Although in an ordinary meeting the doors may be kept open, yet in such cases it is open to the chairman, if he thinks it advisable to close the doors during the taking of the poll. [P. 111 C. 2; P. 112, C. 1]

Coltman and Rangnekar—for Appellants.

Appellants No. 6 in Person.

Chimanlal Setalvad, B. J. Desai, and Kania—for Respondents.

Shah, Ag. C. J.—This appeal arises out of a suit, which has been filed in consequence of the unfortunate differences that have arisen among the members of the Indian Co-operative Navigation & Trading Co. Ltd. It appears that up to February 1923 the plaintiff's and defendants Nos. 2 and 9 were directors of this company. By a special resolution of May 20, 1923 the company resolved to put in defendants Nos. 3 to 8 as new directors and to remove the plaintiffs from their office as directors. Before that resolution was confirmed the present suit was filed on May 28, 1923, in which the plaintiffs asked for a declaration that the said resolution was illegal and invalid and that defendants Nos. 3 to 8 were not properly appointed. Apparently there was no dispute about defendants Nos. 2 and 9

continuing as directors. This resolution was subsequently confirmed and the defendants filed their written statement, in which they pleaded that the resolution was valid, and made a counter-claim on that basis. Thereafter the parties came to an agreement that they should accept the result of a fresh meeting to be convened according to the consent terms under the direction of the Court. On August 14, 1923, with the consent of all the parties, a consent order was made, the terms of which are important. The effect of that consent order was that a meeting of the shareholders of the first defendant company, the Indian Co-operative Navigation & Trading Co. Ltd., was to be called on September 30, 1923, under the chairmanship of Mr. H. C. B. Mitchell, the Administrator-General of Bombay, to elect six directors. Provision was made for the appointment of a receiver who was to work in consultation with and with the advice of the first and fourth plaintiffs on the plaintiffs behalf and the eighth and third defendants on behalf of the defendants. The order also provided that Mr. Mitchell, as chairman of the said meeting, was to admit to the meeting to be held on September 30, 1923, shareholders of the first defendant company on their putting their signatures or thumb impressions on the books provided for the purpose by the said Mr. Mitchell and on their producing their share certificates or final call payment receipts and that the shareholders of the said company were at liberty to canvass for the purpose of the said meeting. The chairman was to report the result of the said meeting and this suit and two other suits, with which we are not concerned in this appeal were to be put down for hearing on the first day after the October vacation. It was further provided that the resolution for the election of six directors from both groups or for proposing any other person qualified to be a director in lieu of any name in either group be put before the said meeting, with liberty to move amendments on the said resolution. It was provided that defendants Nos. 2 and 9 were not to be removed from the directorship of

the said company and that six more directors were to be added to these two. It appears that some further attention was paid to the details connected with this meeting as a result of which there was a further consent order on August 29, 1923, whereby it was provided that no confirmatory resolution be required to make the resolution passed at the said meeting valid and binding. The terms of the notice convening the meeting were settled and a meeting was to be held at the particular place and time fixed in the order, i. e., in a Shamiana to be erected at the Esplanade Maidan in Bombay. It was also provided that the first resolution mentioned in the notice convening the meeting was to be put first, if it was passed, the other resolutions were not to be put at the meeting. In consequence of these orders of the Court, passed with the consent of all the parties concerned, a meeting was held on September 30; and the chairman made a report to the Court, which is Exhibit 4 in the case, stating the result of the meeting and also the various details connected with the conduct of the meeting. The minutes of the meeting were also put in which showed the different resolutions and the amendments proposed and the result of the voting. The other papers connected with this meeting were submitted by the chairman to the Court. Thereafter apparently the plaintiffs raised certain objections as to the validity of the resolutions passed at this meeting; and the notice of motion for inspection and discovery of the papers connected with this meeting was adjourned to the hearing of the suit. The suit came on for hearing on November 19, when the first thing that was heard was the said notice of motion. After hearing the parties on that notice the hearing was adjourned. The case was then taken up on December 1923, on which date the learned Judge delivered his judgment on the notice. He discharged the notice with costs, and proceeded to hear the suit. The learned Judge came to the conclusion that on evidence no irregularity was established and that nothing was shown which would enable him to say that the sense of the meeting was not

correctly ascertained or that the resolutions purporting to have been passed at the meeting were not validly passed. If the resolutions at the meeting were accepted the result would be that the plaintiffs' claim would fail and the six directors elected at the meeting, who were in fact the same as defendants Nos. 3 to 8, would come in as directors. Accordingly the learned Judge dismissed the plaintiffs' suit, and made an order as to costs. The plaintiffs have appealed from this decree and practically all the objections raised before the trial judge have been raised before us.

I shall first deal with the contention that the learned Judge erred in not adjourning the suit on December 3, as in effect on account of this refusal to adjourn the suit the plaintiffs were deprived of the real opportunity of establishing their objections. It is urged that as no judgment was given on the notice as to inspection and discovery of the papers connected with the meeting the plaintiffs did not know whether they would be required really to go on with the suit on December 3 and it is urged that if the learned Judge had allowed the plaintiff's inspection of the documents, the hearing would have been necessarily adjourned. Under these circumstances it is said that they have not been allowed sufficient opportunity to establish their case. I am unable to accept this contention. It appears that the suit had been on board for hearing from time to time and that the notice was adjourned to the hearing of the suit. The suit was really due for hearing and there is no reason to think that on December 3, if the learned Judge disallowed the application of the plaintiffs for the inspection and discovery of the documents they could have thought that they would not be required to go on with the suit. It was a suit in which any delay was to be avoided as far as possible. Already the matter had been sufficiently delayed and in the interests of the company it must have been obvious that an adjournment could not be justly granted. I am unable to say that the learned Judge was not right in disallowing the application for adjournment.

The next point relates to the validity of the second resolution passed at the meeting. The objection is that the Chairman wrongly disallowed the amendments proposed at the meeting. Three amendments were proposed at this meeting. The first amendment was that ten persons, who were named should be elected directors. The Chairman refused to accept this amendment on two grounds. Firstly, that the terms of the order required that six persons were to be elected and any proposal leading to the election of more than six persons would be out of order, and, secondly, that the ten names contained two names, which were already rejected as having been included in the first resolution, which was by that time negatived according to the calculation of the votes by a decisive majority. This amendment was rightly disallowed as being clearly contrary to the terms of the consent order. The second amendment was that the six persons named be elected directors. The Chairman refused to accept this amendment as not being in proper form, and also on the ground that it was practically asking for a fresh panel so far as one of the six persons, who had already been rejected, was concerned. It seems to me that here also the objection raised against the ruling of the Chairman is not right because according to the consent order the name of any person qualified to be director in lieu of any name in the second resolution could be allowed by way of amendment; but as the amendment was not in that form, it was rightly disallowed. This amendment is not very important, for the proposer of the amendment realised that it was not in a proper form and put in another amendment, in which four persons were named as substitutes for the four persons mentioned in the principal resolution which was resolution No. 2 at the meeting. The Chairman accepted this amendment, but thereafter three out of the four persons intimated to the meeting that they declined to act as directors of the company. Under the circumstances the amendment which was one integral amendment could not be put to the meeting and the amendment as

a whole was therefore ruled out. If the mover of the amendment still wanted to press his amendment he could have moved an amendment as regards the remaining one person who had not expressed his unwillingness to act. But he did not do so. It seems to me that the view the Chairman took as regards the various amendments that were proposed is right. I have dealt with this point in detail, as the appellants have relied upon *Henterson v. The Bank of Australasia* (1) as indicating that if the amendment which the party has a right to move has been wrongly disallowed by the Chairman, it would invalidate the resolution. In the present case, for the reasons, which I have already given, they were properly dealt with by the Chairman.

Then there are various objections as to the course adopted by the Chairman at this meeting. For instance, it is urged that the Chairman was not right in closing the doors, so as to exclude the shareholders present outside the pandal when the poll was taken on the first resolution. It is pointed out that the Chairman ought to have appointed scrutineers and that there was no sufficient time left for the Chairman to make a proper and searching examination of the proxies in order to be able to know whether those proxies would be validly accepted or not. It is also urged that the arrangements at the meeting were not satisfactory in the sense that some people, who were not shareholders, could get in and in fact voted at the meeting, and that some shareholders were kept out and were unable to vote.

All these are objections with regard to which it must be remembered that this was a meeting convened under the orders of the Court and the Chairman was to act in accordance with the orders of the Court so far as they were given and for the rest he had a discretion which the Chairman of such a meeting would have, I may refer to the observations of Lord

Selborne in *In re Indian Zedone Company* (2).

'That the minutes in the books are to be received, not as conclusive, but as *prima facie* evidence of resolutions and proceedings at general meetings; and also it may be added, and I think correctly, that inasmuch as the chairman who presides at such meetings, and has to receive the poll and declare its result, has *prima facie* authority to decide all emergent questions which necessarily require decision at the time, his decision of those questions will naturally govern, and properly govern the entry of the minutes in the book; and, though in no sense conclusive, it throws the burden of proof upon the other side, who may say, contrary to the entry in the minute-book, following the decision of the chairman, that the result of the poll was different from that there recorded.'

These observations were made with reference to a meeting, which was held on behalf of a company and it seems to me that they apply with greater force to a meeting like this, where the Chairman is acting under the orders of the Court under special circumstances such as we have in this case. It seems to me that the report of the Chairman to the Court and also his evidence recorded at the hearing should have considerable weight, and there is really nothing in the evidence to show that anything was done at the meeting, which could improperly affect the voting and the proper recording of the votes. I do not think that these objections could properly be allowed. Subject to what I have to say with regard to the application for the inspection of the documents, it seems to me to be enough to say generally that under the circumstances in the objections relating to the general conduct of the meeting, there is no substance. There is no evidence of any real value in support of these objections.

The important point in the appeal, which has presented some difficulty, is the point as to the right of the appellants to inspect the papers relating to the voting at the meeting. It is urged that in view of Articles 71 and 76 of the Articles of Association it was essential to determine whether the voters whose votes were recorded, were competent to vote according to the provisions of these articles. The Plaintiffs urge that unless they

(1) [1893] 45 Ch. D. 330=59 L.J.; Ch. 794=8 Mag 301.

(2) [1881] 36 Ch. D. 70=53 L. J.; Ch. 468=50 L. T. 547=32 W. R. 481.

are allowed to see the proxies and the register of the share-holders showing which votes were recorded they could not make out these objections. This point has apparently considerable force; and, speaking for myself, in spite of the weighty considerations referred to by the learned Judge in his judgment for refusing the application for the inspection and discovery, it seems to me that it would have been better if this inspection had been allowed. All grounds of dissatisfaction or complaint would have been removed. If the application had been granted, no doubt, it would have meant delay, and that was a consideration not to be ignored under the circumstances of the case. After a careful consideration of the record and the arguments which have been forcibly put on behalf of the appellants, I have come to the conclusion that really the plaintiffs have laid no foundation for the suggestion that the inspection would yield any useful result from their point of view. In the first place the plaintiffs or those who are working on their behalf had ample opportunity during the month after the notice and before the meeting was held to point out to the Chairman the course which he was to adopt in order that no invalid votes may be recorded. There is no suggestion that during that time anything that could be done by way of securing that result was not done by the Chairman. Then we have the fact that at the meeting no objection of any kind with reference to any voter was made. It appears from the record that the solicitors of the plaintiffs were present and the plaintiffs were not without legal assistance. The absence of any objection on this point at the meeting or of any indication that they would have some objection on that score is not in favour of the plaintiffs. But the most important thing against them, which is to be borne in mind is, that when the Chairman was examined at the hearing, though he was cross-examined on certain points, not a single question was put to suggest that in the examination of the proxies or of the register of the share-holders, in respect of the votes that were recorded at the

meeting, he had omitted to do something, which he ought to have done, or that he had done something, which he ought not to have done, in order to be able to decide whether a particular proxy or a particular vote was in accordance with the provisions of Articles 71 and 76 of the Articles of Association. It is true that an attempt has been made before us particularly with reference to one of the voters who held forty-two proxies to show that he was not entitled to vote. But the evidence on that point is far from satisfactory and one case of that kind does not under the circumstances appear to me to justify the general suggestion that the result of the inspection might materially alter the voting on the first resolution. It is important to remember that the result was duly recorded in the minutes. On the first resolution, which was really the most important from the plaintiffs' point of view, 803 votes and 2582 proxies were recorded in their favour; whereas 1410 votes and 2652 proxies were recorded against them. The Chairman has also given an analysis of the proxies which were received by him [Exh. (E) at p. 22 of Part III] Except as to one voter, who is No. 12 in the list it is not suggested even now, nor was it suggested at the hearing that any other voter had noted contrary to the requirements of Articles 71 and 76 of the Articles of Association. That analysis also shows the proxies, which were disallowed and which were disputed. The disputed proxies are 81 and the proxies disallowed are 98 in number. Even if we take the number of the disputed proxies in favour of the plaintiffs, it is clear that the result of the voting is not affected. The Chairman stated in his evidence in effect that he took all possible precautions to check the proxies. Under these circumstances, though it seems to me that ordinarily the plaintiffs would have the right of inspecting these documents with a view to establish their objections, I am unable to hold that under the circumstances of the case there was any error in the order of the learned Judge.

In the result I would dismiss the appeal and affirm the decree of the trial Court except as to costs.

As regards the costs of the suit incurred up to the date of the first consent order, *i. e.*, up to August 14, including the costs of the rule *nisi* each party should bear its own costs. The costs of the consent orders and the costs up to the date of the meeting including the cost of the meeting, should come out of the assets of the company. The costs of the notice of motion and the costs of the suit after the date of the meeting should be paid by the plaintiffs. The appellant to pay the costs of this appeal. On account of the consent orders, it has become unnecessary to examine the merits of the plaintiffs' claim as originally made, and having regard to all the circumstances it seems to us to be fair that each party should bear its own costs up to the date of the first consent order inclusive of the costs of the costs of the rule *nisi*.

As regards the costs of defendant No. 9, we order that the plaintiffs should pay his costs up to the date when he was discharged in the lower Court and his costs in appeal. The receiver's costs should come out of the assets of the company.

Fawcett, J.—I agree with the judgment and orders proposed by my learned brother. I think, the legal position, after the report of Mr. Mitchell was received, must be borne in mind. It is not the case that the result of the voting, as recorded in this report and appendices, can be attacked as freely as if the meeting had not been held under the Court's orders and under the chairmanship of an officer appointed by the Court specially for that purpose. The case is like that of a report of a commissioner for a local investigation falling under Order 26, rule 10, Civil Procedure Code, and although that particular rule does not in terms cover the present case, it does afford a useful guide as to the situation arising. The adducing of evidence in regard to objections to a commissioner's report is subject to the discretion of the Court, as has been ruled by the Privy Council in *Grish Chunder Lahiri v. Shoshi Shikhares-*

war Roy (3) and the Court had, therefore, in my opinion, a certain control as to the kind and amount of evidence that should be allowed to be adduced in regard to the objections taken to the result of the voting as reported by Mr. Mitchell.

Again the case may be likened to that of an arbitration, for in effect the company was appointed to decide between the contending groups of proposed or alleged directors, and regarded from that point of view the case is similar to one where objections are raised to the validity of an award on various grounds. In such a case the questions arising are generally dealt with on the affidavits put in by the respective parties and, if necessary, after examination of the arbitrator. The appellants in this case had, in my opinion, sufficient opportunity to adduce that kind of evidence attacking the report of Mr. Mitchell as to the results of the meeting, and they have filed very lengthy affidavits in regard to the matter. I agree with the view taken by the learned Judge, when he says:—

"I think I may safely assume that when so experienced and able an officer as that appointed by the Court on this occasion was in charge of the meeting and furnished a report regarding the proceedings, on the face of which report there is nothing to show that this meeting was not properly conducted, the Court may take it for granted, unless good reasons are shown to the contrary, that everything was done in accordance with law."

The examination of Mr. Mitchell also, I think, corroborates the statement in his report as to the due precautions that were taken to prevent irregularities in voting, such as persons entitled to vote not being able to do so, or persons not entitled to vote being allowed to do so. The objections that have been raised about the result of the voting have been sufficiently dealt with in the judgment of the learned Chief Justice, and I will only add a few remarks.

In regard to the objection, that the chairman closed the doors during the taking of the second poll, in my opinion, he was clearly justified in doing so having regard to the fact

(3) [1900] 27 Cal. 951=27 I. A. 110=4 O. W. N. 631=10 M. L. J. 356=2 Bom. L. R. 709=7 Sar. 687 (P. C.)

that this was not an ordinary meeting of a company, but a meeting in which special precautions had to be taken in view of the rivalry between the two groups. Although in an ordinary meeting the doors may be kept open, yet in the present case, it was in my opinion, open to the chairman, if he thought it advisable to close the doors during the taking of the poll. As to the checking of the proxies with reference to Articles 71 and 76 of the Articles of Association of the company, no substantial ground has been shown for thinking that a scrutiny would really give a different result, in view of the large majority obtained on the defendants' side. The probabilities are that the objections on either side would tend to cancel each other, just as Mr. Mitchell found that out of twenty-four shareholders who were present and voted, although they had also given proxies, eleven were 'ayes' and thirteen 'noes'.

In regard to the objection that no scrutineers were appointed, it is sufficient to say that there was no request made to the chairman at the time for their appointment, and, the ordinary rule is that scrutineers need not necessarily be appointed. I agree with my learned brother that substantially there is no reason to think that the result of the voting would be materially altered by an inspection of the records, of which inspection is sought, or by a scrutiny into the voting both by person and by proxy. I think this is clearly corroborated by the admission of the former secretary of the company, who gave evidence that he knew that the majority at the meeting was against them and so he left, as well as by the statement of Mr. Mitchell that one of the plaintiffs, Mr. Rangall, told him, when he was asked whether he was going to vote, 'It is no good' and pushed past him. In my opinion, there can be no doubt that there was a strong majority against the appellants; and so far as there may have been an irregularity on the part of the lower Court in not allowing inspection of the register of the company and the proxies, etc., it is one which falls, in my opinion, under

S. 99 of the Civil Procedure Code, and affords no ground for reversing the decree of the lower Court. The inspection of these documents should perhaps have been allowed in view of the fact that they were appended to or referred to in Mr. Mitchell's report, and so may be said to have been part of the proceedings put in evidence in regard to the result of the meeting. But it is not quite irrelevant to note that there are restrictions in England in regard to the inspection of ballot papers in elections both to the House of Commons and in regard to Municipal elections, as stated in Halsbury's Laws of England, Volume XII, at pp. 428 and 511. Such inspection cannot be obtained without an express order of the Court; strong grounds for making such an application must be shown, and the Judge must be satisfied that the application for it is made *bona fide*. I do not say that this applies to the present case because these restrictions are statutory; but it does show there are some considerations against a free right of inspection of voting papers in a case like the present.

Appeal dismissed.

1925 BOMBAY 112

SHAH AND CRUMP, JJ.

Ganpat Chandrabhan and others—
Defendants—Appellants.

v.

T. M. Ramchandra and others—
Original Plaintiffs and Defendants—
Respondents.

S. A. No. 70 of 1922, Decided on 10th December 1923, against the Order of Asst. J. of Khandesh in A. S. No. 224 of 1920.

Deccan Agriculturists Relief Act, S. 10 A—
Section is retrospective in effect.

S. 10 A is not confined in its applicability to transactions which are entered into after the date on which that section was enacted or was extended to the particular district.

[P. 113, C.]

K. H. Kelkar—for Appellants.

P. B. Shingne—for Respondent No. 1.

Shah, J.—In accordance with the judgments of the Full Bench [1924 Bom. 219] with reference to the first question, referred to that Bench we hold that Ramsing was an agriculturist as defined by the Deccan Agriculturists Relief Act at the date of the transaction in question. It would, therefore appear that under S. 10A of the Deccan Act, the plaintiff would be entitled to adduce evidence to show that the transaction was not a sale, but a mortgage.

It is urged on behalf of the appellants as against this view, that S. 10A really applies to transactions which are entered into after the date on which S. 10A came into force in this District. The contention is that the benefit of S. 10A extends to transactions entered into after the enactment of the section, or after its application to the particular District. I am unable to accept this contention. The words of the section are clear, and do not limit its application to transactions which are entered into after the section was enacted or applied to a particular District. The section refers to "any transaction" in issue entered into by an agriculturist or any person through whom such an agriculturist claims. The words "any transaction" are indicative of the wider application of the section. It is also opposed to what I may call the necessary implication of the *ratio decidendi* of the Full Bench judgment in *Sawantrava v. Giriappa Fakirappa* (1). It is a matter of common knowledge that during all these years after S. 10A was enacted and extended to the whole Presidency, it has been applied to all transactions, whether entered into after that date or before that date, provided the party to the transaction was an agriculturist as defined by the Act, subject of course to the other provisions of the section, without any objection having been raised. I have, therefore, no hesitation in rejecting the argument which has been urged on behalf of the appellants in support of the view that S. 10A must be applied only to transactions which are entered into after the date on which that section

was enacted or extended to this particular District.

The result is, that the order appealed from is confirmed and the appeal dismissed with all costs in this Court.

Crump, J.—I entirely agree. As to the point now raised before us, I have no doubt whatever that S. 10A of the Deccan Act is intended to be retrospective in its application, and that the only test is that which the section itself lays down whether a person seeking the benefit of that section was an agriculturist at the time of such transaction. The word 'agriculturist' necessarily means an agriculturist as defined by the Act, and the answer to the question which we referred to the Full Bench shows that the extension of S. 2 and S. 20 is sufficient to make a person an agriculturist within the meaning of the Act. It follows plainly on the facts of the present case that Ramsing was an agriculturist for the purposes of S. 10A, and that evidence is admissible as to the real nature of the transaction. Not only is this clear from the words of the section, but it is equally clear from the well-known object of the Legislature in enacting that section. It is owing to the decision of this Court in *Abaji v. Laxman* (2), that S. 10A was enacted, and it would be idle to suggest that the evils which this Court pointed out could have been in any way met by a section which is not retrospective in its operation. With all respect to the learned Pleader who has raised this point, it is not, in my opinion, arguable.

Appeal dismissed.

(2) [1906] 30 Bom. 426=8 Bom.L.R. 553.

1925 BOMBAY 113

MACLEOD, C. J. AND KAJIJI AND
CRUMP, JJ.

Pandu Dagadu Mahar—Appellant.
v.

Jamnadar Chotumal Marwadi—Respondent.

L. P. A. No. 8 of 1923. Decided on 24th March 1924, from the decision of Marten, J. in appeal under Letters Patent No. 5 of 1922.

(1) [1914] 38 Bom. 18=21 L.C. 4=15 Bom.L.R. 778. (F.B.)

Limitation Act, Sec. 14—Proceeding taken in right Court but continued in a wrong Court justifies exclusion of time occupied by proceeding in wrong Court.

On April 1912, an application to execute a decree was presented to the proper Court (Wadgaon Court). As the Judge happened to sit in the Court at Haveli he passed orders at Haveli on April 15th, 1912. The High Court on appeal held on 3rd February 1915, that the proceedings from and after 15th April were without jurisdiction. On the direction of the High Court the application was therefore further heard but was struck off on 30th June 1915. A fresh application was presented on 3rd January 1919. The application was in time by excluding the period from 15th April 1912, to 3rd February 1915.

Held: that the period should be excluded under Sec. 14 (2) for the decree holder ought not to suffer because when the proper proceedings were in the Wadgaon Court, the Judge sitting in the Haveli Court wrongly passed the orders on 15th April 1912, and the proceedings thereon should be treated as a separate proceeding and pertaining to the original proceeding which was filed in the Wadgaon Court. [P. 115, C. 1]

V. D. Limaye—for Appellant.

Patwardhan and D. G. Dalvi—for Respondent.

Macleod, C. J.—In this case the plaintiff obtained a decree on November 27, 1907, in the Wadgaon Court in the Poona District, for possession of certain property. By a darkhast No. 29 of 1919 he is now seeking to execute that decree and an objection has been taken by the judgment-debtors that the darkhast was barred by limitation.

That question depends on a further question whether the darkhast of June 7, 1916, was itself in time. The darkhast before that was dated April 10, 1912, and admittedly unless some of the period between April 10, 1912, and June 7, 1916, is excluded the darkhast of June 7, 1916, was out of time. The darkhast of April 10, 1912, was properly filed in the Wadgaon Court but thereafter as that Court had to sit for a certain number of days in a month at the Haveli Court, a notice was issued that the Judge would be sitting in the Haveli Court to hear that darkhast. The defendants did not appear and the Judge sitting in the Haveli Court made the warrant for possession absolute. The defendant objected to that order on the ground that the Court had no jurisdiction to pass that order sitting

in the Haveli Court and appealed to the District Court which on February 26, 1913, set aside that order. The plaintiff appealed to the High Court but on February 3, 1915, that appeal was dismissed. The darkhast was finally brought on board in the Wadgaon Court on June 30, 1915, when it was struck off owing to the absence of the plaintiff. When the plaintiff sought to proceed with the execution of darkhast No. 29 of 1919, he was confronted by the plea of limitation. The District Judge directed the Subordinate Judge of Wadgaon to proceed with the execution. Against that order an appeal was filed to the High Court which was summarily dismissed by Mr. Justice Shah. In the Letters Patent appeal there was a difference of opinion between Mr. Justice Marten and Mr. Justice Pratt, so under clause 36 of the Letters Patent the opinion of the senior Judge which was in favour of the appeal being dismissed prevailed. The defendants have filed a further appeal under the Letters Patent.

There is no authority on the question which we have to decide. Mr. Justice Marten was of opinion that S. 14 (2) was intended to protect a party from time running against him during the pendency of a *bona fide* proceeding which might eventually prove abortive by reason of jurisdiction or some similar cause. He referred to the decision in *Hira Lall v. Budri Dass* (1) where it was held that a proceeding to enforce a decree taken *bona fide* and with due diligence before a Judge whom the party *bona fide*, though erroneously, believed to have jurisdiction, was a proceeding within the meaning of S. 20, Act XIV of 1859, whether the Judge actually decided that he had jurisdiction, or supposing himself to have jurisdiction acted accordingly. The only distinction from the present case is that in that case there was no darkhast filed in the proper Court in which time was running when the wrong applications were made and as they were held to have been made *bona fide*, in a Court which had no

(1) [1880] 2 All. 792 = 7 I. A., 167 = 6 C. L. R. 561 = 4 Sar. 157 (P. C.).

jurisdiction, the time taken up in making those applications was excluded. Here undoubtedly there was a darkhast filed on April 10, 1912, which was filed in the proper Court, and there would be a difficulty in determining whether the proceedings taken up by the Judge on his own motion apparently when sitting in another Court were proceedings of a different character to the proceedings originally taken in the Wadgaon Court. But if the proceedings in the Haveli Court are considered as original darkhast proceedings taken *bona fide* in a Court without jurisdiction then undoubtedly the time from April 15, 1912, would have to be excluded. We do not think that in this case the plaintiff ought to suffer because when the proper proceedings were in the Wadgaon Court, the Judge sitting in the Haveli Court wrongly entertained the darkhast. For the purpose of this application, we think the notice of April 15, 1912, and the steps taken therein should be treated as a separate proceeding and not as appertaining to the original proceeding which was properly filed in the Wadgaon Court. It was only owing to the fact that the Judge was sitting for part of his time at the Wadgaon Court, for part of his time in the Haveli Court, and for part of his time in another Court, that a case of this nature could possibly arise. I very much doubt whether the framers of the Indian Limitation Act could have contemplated the possibility of a Judge being right in taking up certain proceedings when sitting in one Court and wrong in taking up the same proceedings when sitting in another Court.

The appeal, therefore, must now be dismissed with costs.

Kajiji,—J. I agree.

Crump,—J. I agree.

Appeal rejected.

1925 BOMBAY 115

SHAH, Ag. C. J. AND FAWCETT J.,
Balvant Vishnu — Plaintiff—Appellant.

v.

Mishrilal Shivnarayan and others—
Defendants—Respondents.

S. A. No 47 of 1923, Decided on 7th August, 1924, from the decision of Asst. J. at Dhulia, in A. No. 336 of 1920.

(a) *Contract Act, S. 20—Contract containing stipulation to pay difference between contract price and market price in the event of breach of contract by either party—contract may not be wagering.*

The agreement between the plaintiff and the defendant was to the effect that the plaintiff was to sell cotton to the defendant at the rate of 160 rupees per kandi and the plaintiff received ornaments as earnest money. On failure of defendant to take delivery on due date he was to pay the loss in accordance with the then prevailing rate. There was also a stipulation on the part of the plaintiff as follows:—"If the price be above Rs. 150 then I will give you the profits." On the due date the price fell down to Rs. 130/- and the defendant did not take delivery. In a suit to recover damages for breach of a contract the defence set up was that the transaction was of a wagering character:

Held: that the contract was not a wagering transaction. The fact that the parties had unnecessarily provided for the consequences of a breach namely that if the market price on the due date fell and the purchaser did not take delivery, then he was to pay the loss and that if the market went up and the vendor failed to give delivery then the vendor was to pay the loss did not make difference.

[P. 117, C. 1,2]

(b) *Construction of documents — Contract Court should lean towards a construction favouring the validity of the contract rather than its illegality.*

S. R. Bakhale—for Appellant.

H. C. Coyajee and P. V. Kane—for Respondents.

Shah, Ag. C. J.—This appeal arises out of a suit brought by the plaintiff to recover damages for a breach of the contract entered into by the defendant's father, now deceased, with the plaintiff to purchase twenty Khandies of cotton. The contract was entered into on December 9, 1916, and was in these terms:—

"To Shivnarayan Hajarimal Marwadi, residence Bhusaval, be pleased to read the salutations of Balvant Vishnu Nargundkar, residence Bhusaval. The object of writing this letter is that a contract is made between you and me for cotton, approximately 20 Khandies of large Malka

pur measure, that is of 392 seers, at Rs. 150 for every Khandy. This contract was made approximately five or six days ago. You can take delivery of the said cotton goods on January 1, 1917, or any time before, by coming here, that is, by coming to our field in village Charthane. I will take the price of the goods immediately after the weighment and delivery of the cotton and on the same day. I have taken to-day for earnest two pairs of silver todas, both together 225 rupees in weight. Their price will be computed according to the market rate of today. If under the above contract you do not take delivery I will recover from you loss in accordance with the price at the time in Malkapur Peth. If the price be above Rs. 150 then I will give you the profit."

The plea of the legal representatives of Shivnarayan was that this was really a wagering transaction. The trial Court accepted that defence, principally on the ground that the last clause in the contract that "If the price be above Rs. 150, then I will give you the profit" was to be read as affording a key to the whole contract, and that the other terms were to be treated as a sort of disguise to conceal the real meaning of the parties, namely, that it was a sort of stake on the question whether the rate of the cotton on a particular date would be over or below Rs. 150. It is one of the defects in the judgment of the trial Court, to my mind, that though the learned Judge was satisfied that at least the plaintiff intended to carry out the first part of the agreement by giving actual delivery, if the defendant had only chosen to claim it, still he came to the conclusion that it was a wagering transaction. No doubt the learned Judge says that the common intention of both parties was to deal in differences only. He also found that the net damages amounted to Rs. 162 making due allowance for the price of the ornaments which are referred to in the contract. He held that on the due date of the delivery Rs. 130 was the rate per Khandy and calculated the damages on that footing; but he dismissed the suit with costs.

The plaintiff appealed to the District Court, and the learned Assistant Judge who heard the appeal found on the first issue that the contract was of a wagering nature, and in that view he did not consider it necessary to deal with the question of damages any further.

The plaintiff has appealed to this Court, and the principal question in the case is whether the contract is in the nature of a wager. There is not much of evidence in the case and I may observe that the decisions of the lower Courts are principally based upon the terms of the contract. It is largely a question of construing the contract. I am unable to accept the view taken by the lower Courts. The contract is for a sale of twenty Khandies of cotton which, there is no dispute in the case, the plaintiff was in a position to give delivery of, if the delivery was demanded, and if the defendant was ready to take delivery on the due date. Then there is the fact that certain silver todas were given as earnest for the fulfilment of this contract by the defendant. The last two clauses in the contract are the important clauses, which have induced the lower Courts to come to the conclusion that this must be treated as a wagering transaction. It is provided that "if under the above contract you do not take delivery I will recover from you loss in accordance with the price at the time in Malkapur Peth." So far it is nothing more than a statement of the consequence of a breach on the part of the defendant. It does not, to my mind, in any sense indicate that the intention was not to give or to take delivery. If the defendant failed to take delivery, which he might in any case even if the contract was a legal transaction, then he was to make up for the loss resulting from his not taking delivery.

The clause that if the price be above Rs. 150 then the plaintiff was to give the defendant profit appears to have caused a difficulty in the case. It seems to me that it is only a continuation of the statement of the consequences of a breach on either side. If the rate was below the contract rate at the due date, then the

defendant would have to pay the loss if he did not take delivery, and if the rate at the due date be above Rs. 150, then the plaintiff would have to pay the difference in case he failed to give delivery. No doubt the words "If I fail to give delivery" are not to be found in this clause. If they had been used, the matter would have been beyond the range of controversy. But taking this to be a contract between two ordinary parties, I am unable to read this clause in any other sense, and the meaning which I put upon it, and which in my opinion it naturally bears, is one which I have just indicated, namely, that if the plaintiff failed to give delivery and the price at the due date was above Rs. 150, then he was to give the profit to the defendant.

It appears that in the cross-examination the defendant's pleader put this matter to the plaintiff and he answered as follows:—"I was to pay the differences only if I refused to make delivery and the price was against me." It seems to me that the parties in this case have unnecessarily proceeded to provide for the consequences of a breach, namely, that if the market price on the due date went against the purchaser, and if he failed to take delivery, as he might well fail to do on that account, then he was to pay the loss, and if the market went against the vendor, and if he failed to give delivery, then he was to pay the loss. That seems to me to be the true and natural meaning of this contract. If this contract is to be read with a view to give effect to it as far as possible and not with a view to invalidate it, it seems to me that the contract lends itself easily to that interpretation: and that is the view which I take of this contract. It is not necessary to say more on the subject, nor is it necessary to refer to the cases.

In any case, it seems to me that the proof falls far short of what would be necessary to indicate the common intention on the part of both parties to deal in differences only from the beginning. That indication is lacking in the present case. I find it extremely difficult to accept the view taken by the lower Courts. The case

of *In re Gieve* (1), which has been much relied upon, particularly by the trial Court, was quite a different case. The terms of the contract there were clearly indicative of the fact that no delivery was intended to be given or taken, and if by chance the buyer in that case wanted delivery, then he was to give certain extra price. I do not consider it necessary to set forth the note of contract in that case: but it is enough to point out that that was quite a different case from the present one. In the present case the contract begins with the express intention to give and take delivery, and that in the event of the defendant not taking delivery, he was to pay the loss. As a matter of fact the occasion for applying the clause, upon which so much reliance is placed by the lower Courts on the facts of this case, has not arisen. The price did not go above Rs. 150, nor do I see any indication in the case that the price fixed under the contract was so far above the normal ruling rate at the date of the contract so as to afford some basis for the view that it was a sort of stake upon the ruling rate being Rs. 150, at the due date. The market rate on the due date is found by the lower Court to be Rs. 130, and the fluctuations within limits must be taken to be within the contemplation of parties as ordinary incidents of such contracts, and cannot be taken as indicative of any desire to fix up an abnormally high rate with a view to gamble on the possibility of that rate being the ruling rate on the due date.

I am, therefore, of opinion that this contract was not a wagering transaction, but a legal contract, and as admittedly the deceased Shivnarayan failed to carry out the terms of the contract, his heirs are liable in damages.

As regards the amount of damages, though the lower appellate Court has not recorded any finding, it is conceded before us that the finding of the trial Court on this point must be accepted. The plaintiff claimed damages on the footing of the difference between the contract price and the

(1) [1899] 1 Q. B. 731=80 L. T. 438=47 W. R. 441=6 Manson 136=15 T.L.R. 251

Price realized by the sale of this cotton long after the due date for the performance of the contract. He is clearly not entitled to damages on this footing. There is nothing to show that the defendant ever extended the time for the fulfilment of this contract. Therefore the only basis upon which the plaintiff could claim damages would be the basis of the difference between the contract price and the market price of the goods on the due date. That has been determined by the trial Court, and we accept that finding. I would allow this appeal, reverse the decree of the lower appellate Court, and pass a decree in favour of the plaintiff for Rs. 162. The plaintiff to have his costs throughout on the amount decreed.

Fawcett, J.—The defendant set up a plea that the contract sued upon is a wagering one falling under S. 30 of the Indian Contract Act. The onus of establishing that plea rests upon him. There must be a common intention, not only on the part of the defendant's father, who entered into the contract, but also on the part of the plaintiff, not to give delivery, but merely to pay differences according as the market price fell or rose above the figure of Rs. 150. So far as the defendant's father was concerned, the lower Court gave reason, for thinking that his intention was not to do any real business in cotton the subject matter of contract, but merely to speculate on the rise and fall of the market. But the lower Court was more favourable in regard to the plaintiff's intention, and, after considering all the circumstances felt satisfied that he at least intended to carry out his part of the agreement by giving actual delivery, if the defendant had only chosen to claim it. The only thing that goes against the plaintiff is the last clause in the agreement that "if the price be above Rs. 150, then I will give you the profit." The two lower Courts have held that that plainly shows that the real agreement between the parties was not a commercial transaction, but a wager on the rise and fall of the market. But, in view of the circumstances favourable to the plaintiff that I have

already alluded to, before the plaintiff is convicted of an intention to wager, it must be conclusively established that that is the proper interpretation of the contract, because only on this particular construction can this common intention be held proved. I admit that the view taken by the lower Courts is one that naturally arises from the way in which this particular sentence follows upon a sentence contemplating the defendant not taking delivery. And if the contract alone is looked at, it seems quite natural to say that the words "if the price be above Rs. 150 then I will give you the profit" still contemplate the contingency of the defendant not taking delivery. But, on the other hand, that is not a necessary construction, and I think it is at any rate a possible construction to say that the parties were contemplating the other position, namely, the possibility of the plaintiff not giving delivery and the price not rising above Rs. 150. In a case of this kind where the plaintiff's conduct is shown to be otherwise unexceptional, I think the Court should lean towards a construction favouring the validity of the contract rather than its illegality. I think we are entitled to give the plaintiff the benefit of this favourable construction, although apparently it was a construction that was not urged on his behalf before the two lower Courts. I agree, therefore, in the order proposed by my learned brother.

Decree reversed.

1925 BOMBAY 118

MACLEOD, C. J. KAJIJI AND KEMP, JJ.

Velji Bhimsey & Co.—Appellants.

v.

Bachoo Bhaidas.—Respondent.

O. C. J. Letters Patent Appeal No. 86 of 1923. decided on 10th March 1924.

(a) *Damages—Wrongful arrest—Decree against the estate of the deceased—Wrong order by the Court to arrest the heir in execution—Arrest in execution—Decree-holder is liable.*

A money decree was passed against the estate of a deceased person in hands of his heirs. On an application made to execute the decree

the Court directed execution to issue against defendant No. 1 (present plaintiff, one of the heirs). In execution the plaintiff (defendant No. 1) was arrested under order obtained from the Deputy Registrar and brought before the Registrar of the Court who made the following order: 'Decree against the estate of the deceased. No execution by arrest should have been issued against the first defendant's person. Warrant of arrest was bad and illegal and not justified by the tenour of the decree'. Accordingly the defendant was released. In an action for damages for wrongful arrest:

Held: that the plaintiff was entitled to damages for wrongful arrest. The decree entitled the defendants to execute it against the property of the deceased in the hands of defendant No. 1 and they must be taken to have been aware when they applied for the arrest of the plaintiff that such conduct was not justified. [P. 119, C. 2, P. 120, C. 1.]

(b) *Letters Patent (Bom.) S. 15—Whole case, and not only the point in difference, can be considered.*

In a *Letters Patent* appeal, the appeal Court is not restricted to consider the point on which the Judges in the Court of appeal have differed. The whole decree lies open before the Judges hearing the *Letters Patent* appeal. [P. 120, C. 1.]

Campbell and Kania — for Appellants.

M. V. Desai — for Respondent.

Macleod, C. J.—The plaintiff brought this action to recover damages for wrongful arrest and imprisonment.

The suit was dismissed by Mr. Justice Mulla and on an appeal from that decision, the Judges of the Appeal Court differed. The Acting Chief Justice was of opinion that there should be a decree for the plaintiff for Rs. 100 as damages. Mr. Justice Crump was of opinion that the appeal should be dismissed. Under clause 36 of the *Letters Patent*, the opinion of the senior Judge prevailed. Accordingly there was a decree for the plaintiff for Rs. 100. But under S. 22 of the *Presidency Small Cause Courts Act*, as the plaintiff had recovered less than Rs. 300, no order was made with regard to his costs in the trial Court. The plaintiff has now appealed under clause 15 of the *Letters Patent*.

The facts of the case as set out in the judgment of the acting Chief Justice are that the firm of Velji Bhimsay & Co. filed a suit against the present plaintiff and his two minor brothers as surviving members of a joint Hindu family, on a promissory note passed by Bhaidas Vallabh-

das deceased a late member of the family. A decree was passed in favour of the plaintiffs for Rs. 510-9-6 and costs and it was ordered that in default of payment of the decretal amount by the defendants, the same was to be levied by seizure and sale of the property of Bhaidas Vallabhdas deceased that would come to their hands as his heirs and legal representatives.

The money was not paid and no execution was levied for a year after the date of the decree. On May 11, 1922, a notice for renewal of judgment under order 21, rule 22, was issued. The defendant did not appear and an order was made on June 24, 1922, in these terms: "Execution to issue against defendant 1". On July 4, the plaintiffs Velji, Bhimsey & Co. applied for a writ of execution against the person of defendant No. 1 and a warrant was issued by the Deputy Registrar for the arrest of the first defendant who was arrested at 9-30 A. M. on the morning of July 12, 1922, and was produced before the Registrar. The Registrar made the following order: Decree against the estate of the deceased. No execution by arrest should have been issued against the first defendant's person. Warrant of arrest bad and illegal and not justified by the tenour of the decree." Accordingly the defendant was released.

The present defendants seem to base their defence on the order made on June 24, 1922, and contend that under that order, they were entitled to apply for the arrest of the first defendant. But that order was merely a formal order allowing execution to proceed and it cannot possibly be said that it entitled the plaintiffs in the suit to apply for a warrant for the arrest of the first defendant.

The plaintiffs in the Small Cause Court suit knew perfectly well that they were not entitled under that decree to apply for the arrest of the defendants. They must have known or ought to have known that the order of June 24, 1922, merely enabled them to proceed with the execution of the decree, and as the decree only entitled them to execute it against the Property of Bhaidas in the hands

of the defendants, they must be taken to have been aware when they applied for the arrest of the first defendant that such conduct was not justified. The plaintiff, therefore, is entitled to damages for wrongful arrest.

The respondents have filed cross objections and ask to have the damages increased. There was no excuse whatever for the action of the defendants. To arrest a man without any justification is a very serious matter and may have very serious consequences. The consequence of limiting the decree to hundred rupees was that the plaintiff under S. 22 of the Presidency Small Cause Courts Act could not be given the costs of the suit. It has been argued that in a Letters Patent appeal, we are only entitled to consider the point on which the Judges in the Court of Appeal have differed. There is no warrant for that argument. Under clause 36 of the Letters Patent, the opinion of the senior Judge prevails. Under clause 15 an appeal lies from that decree, without any limitation imposed upon the powers of the Appeal Court. The whole decree lies open before us, and on the question of damages, we do not think that Rs. 100 awarded, in the circumstances of the case, are sufficient. We increase the damages on the cross-objections of the respondent to Rs. 300, so that the plaintiff will get his costs throughout.

Kajiji J.—I concur.

Kemp J.—I also concur.

Decree varied.

1925 BOMBAY 120

SHAH, Ag. C. J. AND FAWCETT, J.

Bhagavanji Sankleswar Dave—
Plaintiff—Appellant.

v.

Ahmedabad Electricity Co., Ltd.—
Defendants—Respondents.

S. A. No. 240 of 1923, Decided on 11th August 1924, from the decision of Dist. Judge of Ahmedabad, in Appeal No. 298 of 1921.

Electricity Act (IX of 1910) Sch. Cl. 6, paras 4 and 5 and S. 22—Written requisition is necessary for transfer of connection.

Before a consumer can be supplied electric power from a new connection in substitution of an old one he must put in a fresh requisition in writing under paras 4 and 5 of Cl. 6 of the Schedule to the Indian Electricity Act, [P. 12, C. 2.]

H. C. Coyojee. and Ratanlal Ranchhodas—for Appellant.

O' Gorman and Little and Co.—for Respondents.

Shah Ag. C. J.—This appeal arises out of a suit filed by the plaintiff against the Ahmedabad Electricity Company Limited, for the supply of electricity to premises situated in another street in substitution of the supply which the plaintiff used to have in respect of premises situated near Dhinkwa Chowkey. So far as the supply of electricity to the premises near Dhinkwa Chowkey was concerned, it was properly obtained by the plaintiff on a requisition contemplated by the Indian Electricity Act. IX of 1910. It appears, however, that the plaintiff in accordance with the somewhat loose practice, which used to prevail before the year 1920 asked for the supply of electricity for the new premises without making a requisition in writing as required by clause 6 paragraphs 4 and 5 of the Schedule to the Act. There was some correspondence after he asked for this supply. The company apparently did not insist upon any requisition as required by the Act, and for some other reason put off supplying electricity to the plaintiff. As a result on August 27, 1920, the plaintiff filed the present suit, in which he prayed for an order directing the defendant company to transfer the connection No. 206 from one house to another house mentioned in the plaint.

The company pleaded in defence that the suit was not maintainable, among other things, on the ground that no requisition as required by the Act was made. Soon after this plea was taken, it appears that the plaintiff submitted a requisition as required by clause 6 of the Schedule. But the contentions of the parties with reference to this requisition were not made the subject-matter of any issues in the trial Court at the hear-

ing. The suit proceeded on the original cause of action, and the first question that the trial Court applied its mind to was whether the requisition in writing was necessary before the plaintiff could have a new connection in lieu of the old one. The trial Court decided that point against the plaintiff, and dismissed the suit directing each party to bear his own costs.

The plaintiff appealed from that decree, and in appeal the same position which the plaintiff had taken up in the trial Court was sought to be justified. But the appellate Court was not satisfied as to the correctness of the plaintiff's position, and accordingly dismissed the appeal.

The plaintiff has now appealed to this Court and the only question that arises on this appeal is whether the requisition in writing as required by clause 6 was necessary in order to enable the plaintiff to claim the supply which he wanted in respect of the new premises.

There is no point in the memorandum of appeal, and really no point has been raised before us, as to the right which the plaintiff may have on his requisition which he made in October 1920. The question whether the company were justified in not complying with that requisition as the present suit was pending, has not been investigated in this suit, and which, it is contended by the defendant, is outside the scope of this suit. Whatever the respective rights of the parties may be with reference to that requisition, they must be left to be determined, if they are not adjusted otherwise, in a separate suit.

In this appeal we are concerned with the only question which arises, whether the requisition as required by clause 6 was essential before the plaintiff could claim a supply of electricity as of right. On that point reference is made on behalf of the appellant to S. 22 of the Act, and it has been argued that though a requisition may be necessary where a party asks for supply in the first instance, it is not an essential condition for his claiming the supply as a substitute for the existing supply that he

should make such a written requisition.

It is common ground that there is no express provision for such transfer of supply of electricity from one house to another, and whenever a requisition is made under the Act, it is for particular premises. There is no express provision for the transfer of supply from one place to another. The provisions of the Act indicate that when the plaintiff wanted the supply of electricity for his new premises, he had to make a requisition for that purpose under the Act. That requisition he admittedly did not make before the suit.

It is urged, though I do not see how it can afford any answer to the legal defence raised by the defendant, that the practice of the company was not to insist upon such requisitions when the person concerned wanted the transfer of such supply of electricity from one house to another. It is true that the practice of the company was as stated by the plaintiff. It appears from the purshis put in on behalf of the defendant that the company adopted that practice. But the practice can not alter the provisions of law and the company was entitled, it seems to me, in this suit to insist upon the defence open to them, that the requisition as required by paragraphs 4 and 5 of clause 6 of the Schedule to the Act was necessary. It may be rather misleading and even unfair to an individual that the company should adopt such loose practice, and then insist upon a written requisition as required by the Act, when in fact about that time they supplied electricity to some persons without such requisitions. The propriety of such conduct is not a matter in issue in this suit, and it is not necessary for me to say anything more on that point. It is rather hard upon a person to be told in effect that the company would not insist on a written requisition and when he insists upon his rights he is told that the absence of such requisition creates a difficulty in his way. It may be that by adopting that line of conduct in some cases, there may be an estoppel against the company. But in the present case there is no plea of estoppel put forward, and the

point of estoppel which was urged for the first time in the District Court was disallowed. In the present case there is no basis for the plea of estoppel and there was no issue on that point in the trial Court. The inconvenience to a party resulting from such practice is not an answer to the plea that a written requisition is necessary. As I have said we are not concerned in this case with the rights of the parties on the requisition put in after the suit was filed.

I would confirm the decree of the lower appellate Court and dismiss the appeal with costs.

Fawcett, J.—I concur. There are no doubt some equities in favour of the plaintiff, arising out of the correspondence between the parties prior to the suit, and the practice of the company in not insisting on written requisitions. But equities cannot prevail against the express terms of the Statute, and that seems to me to be a complete answer to the contention of the plaintiff in the plaint that he was entitled to a supply for the new premises without any written requisition of the kind in question. The two lower Courts have, in my opinion, rightly decided that question; and as that is the main basis of the plaintiff's suit, I think we can only dismiss his appeal with costs.

Appeal dismissed.

1925 BOMBAY 122

SHAH, Ag. C. J. AND FAWCETT, J.
Shankarbai Manorbhai Patel —
Defendant—Appellant.

v.

Motilal Ramdas Shah—Plaintiff—
Respondent.

S. A. No. 319 of 1923, Decided on 15th August 1924, from the decision of Assistant Judge of Ahmedabad, on Appeal No. 220 of 1919.

Civil P. C. O., 22 Rr. 4, (3) and 9 and S. 107 (2)—Appeal abating against one respondent does not necessarily abate against the other, though both may be tenants-in-common—Civil P. C., O. 22, R. 9.

During the pendency of a suit for the recovery of possession of certain land by an uncle and nephew as tenants in common the nephew died. Thereupon his widow was substituted as his legal representative. The plaintiffs won the suit. During the pendency of the appeal by the defendant the widow died in November 1919. Till March 1921 no steps

were taken and in that month the defendants applied to bring on record the nephew's sister as his legal representative.

Held: that as the appellants had not applied under O. 22 R. 9 Sub. Rule 2 to set aside the abatement the appeal had abated as regards the nephew and could not be revived, but it did not necessarily follow from this that the appeal abated as against the uncle also. 22 Bom. 718, Foll. [P 122 C 2; P 123 1]

H. V. Divatia—for appellant.

M. H. Mehta—for Respondent.

Shah, Ag. C. J.—In this case the plaintiffs sued to recover possession of a certain house-site from the defendants. The plaintiffs were uncle and nephew and claimed the land as tenants-in-common. The nephew (plaintiff No. 2) died during the pendency of the suit and his widow was joined as his legal representative. The trial Court passed a decree in their favour on April 8, 1919.

The defendants appealed to the District Court. During the pendency of the appeal, the respondent No. 2 Bai Chanchal, the widow of the nephew, died in November 1919. No steps were taken to bring the legal representative of the deceased respondent on the record up to March 1921, when an application was made by the appellants to the effect that the surviving respondent No. 1 was the heir and that the appeal could go on against him without any other person being brought on the record in place of the respondent No. 2. This application was opposed on the ground that the proper heir would be Bai Jekore, the sister of Bai Chanchal's husband; and that as she was not brought on the record the appeal abated as regards respondent No. 2. The learned Assistant Judge held that the appeal abated as regards respondent No. 2, and further held that in consequence thereof the appeal abated as regards respondent No. 1 also. He was of opinion that the shares of the co-owners not being ascertained any decree that may be passed against respondent No. 1 on hearing the appeal would be infructuous, as the decree of the trial Court in favour of respondent No. 2 would stand in any case.

The appellants apparently did not apply to the lower appellate Court to

set aside the abatement and to bring Bai Jakore on the record as the legal representative of respondent No. 2 under Order 22, rule 9, sub-rule (2), as they could have and should have done when their application to treat the respondent No. 1 as the heir of respondent No. 2 was disallowed.

The defendants have appealed to this Court. They have joined Bai Jakore as a party respondent to the appeal.

It is clear that the order treating the appeal as having abated as to respondent No. 1 is wrong. Under rule 4, sub-rule (3), read with S. 10 (2) of the Code, the appeal would abate as against the deceased respondent only. The words "as against the deceased defendant" have been added in the Code of 1908 and give effect to the view which was taken by this Court under the Code of 1882. In *Chandarsang v. Khimabhai* (1) it was held by this Court with reference to S. 308 of the Code of 1882 that as regards the deceased respondent the Court ought to have proceeded under S. 308 and declared that the appeal had abated as to him and proceeded against the other respondents or else to have directed that the legal representative of the deceased respondent should be placed on the record. In that case the suit was of the same nature as the present suit. Under the present Code the position is made clear and it is open to the Court either to hear the appeal as regards respondent No. 1 only or to set aside the abatement under rule 9 of Order 22 and then to hear it as regards both the respondents. No doubt a difficulty may arise, when the abatement is not set aside under rule 9, and the relief which the Court can grant as against the other respondents in appeal is not likely to be effective. That difficulty must depend largely upon the nature of the suit, and the possible relief that can be granted in appeal under the circumstances of the particular case. The decision in *Raj Chunder Sen v. Ganga Das Seal*, (2) upon which the learned

Assistant Judge has relied, has reference to a decree that was passed in a partnership suit and the observations of their lordships of the Privy Council have relation to the nature of the suit and to the terms of S. 368 of the Code of 1882.

The view taken by the Calcutta High Court that in such suits by co-owners practically the appeal abates as a whole if it abates with reference to one of the respondents conflicts with the view taken by this Court in *Chandarsang v. Khimabhai* (1) and does not appear to me to be consistent with the words used in sub-rule 3 of rule 4.

Speaking with reference to the nature of the suit here, I am not at all satisfied that it may not be a matter of real advantage to the appellant to get rid of the decree against them at least as regards respondent No. 1. Their right to have the appeal heard on the merits as regards this respondent is clear: and I am unable to accept the view that because the appeal has abated as regards respondent No. 2 it must be taken to abate as regards respondent No. 1 or that it could not be heard on the merits as regards him.

In this case Bai Jakore has been joined as respondent No. 2: but for the appellants it is conceded that the abatement as regards that respondent stands, as no application for setting it aside has been made.

As regards respondent No. 1, it seems to me that the appeal must be heard on the merits and if the Court is satisfied that the plaintiff's case is not proved it will be open to the Court to dismiss it as regards plaintiff No. 1. It is not necessary at this stage to consider exactly what the effect of such an order would be on the decree, which as now passed by the trial Court would stand as regards plaintiff No. 2: nor is it necessary to consider what decree the lower appellate Court will pass under its power after hearing the appeal on the merits. It is enough for our present purposes to point out that if the defendants succeed, it would place them in a more advantageous position in so far as they would have then to satisfy the plaintiff No. 2 only with

(1) [1897] 22 Bom. 718.

(2) [1904] 31 Cal. 487 = 31 I. A. 71 = 1. A. L. J. 145 = 8 O. W. N. 442 = 14 M. L. J. 147 = 8 Sar. 623 (P. O.)

reference to the decree and not the plaintiff No. 1. That is an advantage which there is no valid reason in law to deprive them of simply because the appeal has abated as to one of the respondents.

It is possible for the Court to exercise its inherent powers in the interests of justice under such circumstances, as pointed out in *Lakhmichand Rewachand v. Kachubhai Gulabchand*. (3). In the present case, though the legal representative of respondent No. 2 in the lower appellate Court is now before us, we do not consider it proper to make any order in the exercise of such powers. The appellants made no application in the lower appellate Court under rule 9 (2) of Order 22 and before us they have accepted the abatement of the appeal as regards respondent No. 2 as an indisputable fact in the case.

I would, therefore, allow the appeal against respondent No. 1, reverse the order of the lower appellate Court relating to him, and remand the appeal to that Court for disposal according to law.

Appellants to get their costs of the appeal herefrom respondent No. 1 and to pay the costs of respondent No. 2.

Fawcett J.—As the plaintiffs were tenants-in-common, I think that under Order 22, rules 4 and 11, the legal representative of the deceased respondent should have been added as a party by an application made within proper time under sub-rule (1) of rule 4. But under sub-rule (3) the omission to do so only has the effect of making the appeal abate as against the deceased respondent. This is, I think, a clear indication of the intention of the legislature that the appeal should not in such a case necessarily, or even ordinarily, abate as a whole. The Privy Council decision in *Raj Chunder Sen v. Ganga Das Seal* (2) was based on S. 368 of the Civil Procedure Code of 1882, which said that the suit should abate, without the addition of the words "as against the deceased defendant," which is made in the Code of 1908.

Inasmuch as the appeal primarily abates only against the deceased

respondent, there is still an appeal pending against the remaining respondent, and under Order 41, rules 13 and 16, the appellant (unless the appeal is dismissed under rule 11) is entitled to a normal hearing and decision.

The remaining respondent can of course raise a preliminary objection that the appeal is not maintainable against him alone : and this was successfully done in the present case. The main reasons for the Assistant Judge's view are given in paragraph 4 of his judgment, which says :—

"In the present case, the shares of respondent No. 1 and of the deceased Chanchal in the plaint property were not ascertained. They were held joint sharers so that, if the present appeal were allowed, that order would not be binding against the representatives of Chanchal. So, there would be the anomalous position that the decree would bind one sharer and not the other. This, coupled with the fact that the shares of these sharers were not ascertained, would make the order of this Court infructuous."

This follows the view taken by the Calcutta High Court that, in a case like the present, where the plaintiffs are joint owners, the necessary result is that the whole appeal abates, because the Court should not be called upon to make two contradictory decrees in the same litigation, which would be the result of allowing the appeal as against the remaining respondent, and not disturbing the decree of the lower Court as against the deceased respondent [of. *Kali Dayal Bhattacharji v. Nagendra Nath Pakrashi*. (4)].

But this view has not apparently been endorsed by this Court, and the decision in *Chandarsang v. Khimabai* (1) is against it, though the point is not discussed.

I agree with my learned brother that it is not a necessary consequence in every such case that the whole appeal abates. In the present case, for instance, supposing the defendants succeed in their appeal on the merits, I do not think (though I speak with some diffidence, as the point has

(3) [1911] 35 Bom. 393 = 13 Bom. L. R. 517 = 11 I. O. 559.

(4) [1919] 24 C. W. N. 41 = 54 I. C. 822 = 30 C. L. J. 217.

not been argued, and is not really before us at the present stage) that the result will be so anomalous or inconvenient that the Court should merely on that account refuse to pass a decree in favour of the defendants as against the respondent No 1. The result will be that defendants fail as regards plaintiff No. 2's share but succeed as to plaintiff No. 1's. The lower Court's order could in the circumstances be modified by (1) directing that defendants do put plaintiff No. 2 in joint possession of the property; (2) dismissing the suit as regards plaintiff No. 1's share; and (3) passing an equitable order as to costs. The appellate Court has, I think, power to pass such a decree as being one "such as the case may require" under Order 41, rule 33, Civil procedure Code. This covers a variance of a decree under appeal, not only for error, but also on grounds which have come into existence since it was passed: see *Sakharam Mahadev Dange v. Hari Krishna Dange* (5); *Rustomji v. Sheth Purshotamdas* (6); *Kanakayya v. Janardhona Padhi* (7); and *Muthu wami Ayer v. Kalyani Ammal* (8).

If plaintiffs in the trial Court had succeeded only regarding plaintiff No. 2's share, the Court could have passed a decree for joint possession in favour of plaintiff No. 2: (cf. *Parashram v. Miraji* (9) and *Naranbhai v. Ranchod* (10)). There was no necessity for a distinct issue regarding joint possession in the circumstances of this case.

The above remarks, however, will not in any way bind the lower Court which will have to decide all the questions arising after hearing arguments on them.

I concur in the order proposed by my learned brother.

Appeal allowed.

(5) [1881] 6 Bom 113.

(6) [1901] 25 Bom. 616=3 Bom. L. R. 227.

(7) [1913] 36 Mad 439=1910 M. W. N. 841=21 M. L. J. 31=8 I. C. 736=9 M. L. T. 64 (F. B.)

(8) [1917] 40 Mad. 818=21 M. L. T. 93=38 I. C. 223=5 L. W. 334.

(9) [1896] 20 Bom. 569=1895 P. J. 161.

(10) [1902] 26 Bom. 141=3 Bom. L. R. 598.

1925 BOMBAY 125

SHAH, AG. C. J. AND FAWCETT, J.

Madhavrao Harbaji Thakur—Defendant—Appellant.

v.

Amababai Laxman Jadhav—Plaintiff—Respondent.

S. A. No. 582 of 1923, Decided on 11th August 1924, from the decision of First Class Sub. J., Nasik in appeal No. 10 of 1922.

(a) *Hindu Law—Debts—Under Mitakshara sons must pay mother's debts though daughter inherits the balance after paying debts.*

Semble—According to the Mitakshara School of Hindu law, sons must pay the debts of their mother, though the daughter inherits the balance of her estate left after payment of her debts. [P. 128 C. 1]

(b) *Mortgage—Mortgagee can't dispute mortgagor's title to property—Evidence Act, S. 116.*

A person sold two properties, A and B to another who conveyed the properties subsequently to the transferor's wife. The wife mortgaged the properties to the defendant. Subsequently a creditor of the original owner of the properties sued him, his wife and the defendant, and obtained a declaration that the first sale by the owner of the properties was a bogus one. Then a money decree was obtained by the defendant against the original owner of the properties and his wife but it was executed against their son as both of them were dead. In execution, property A was sold and the auction purchaser conveyed it to the defendant. Subsequently the plaintiff who was the daughter of the original owner of the properties sued to redeem the mortgage created by the original owner's wife. The defendant contended that the real owner was not the mortgagor but that her husband was the real owner and that property A having been sold in execution was not amenable to the plaintiff's claim.

Held: that the defendant being mortgagee was not entitled to dispute the title of the mortgagor viz., the title of the original owner's wife and that for the purposes of the suit it must be taken that she was the owner, that the sale of property A in execution of the money decree against the husband and the wife represented by their son was not void and invalid and the sale could not be invalidated merely on the score of the omission to bring the plaintiff as heir of the mortgagor on the record and that the plaintiff was entitled to redeem the property B. [P. 127 C. 1, 2]

D. R. Patwardhan—for Appellant.

P. B. Shingne—for Respondent.

Shah, Ag. C. J.—The facts which have given rise to this appeal are these. Bala and Malhari were cousins who owned Survey No. 863 and 808 in equal shares. Apparently in 1890 they

sold these lands to their brother-in-law Devji, who afterwards conveyed one moiety in each of these two Survey Numbers to the wife of Malhari and the other moiety to the wife of Bala. The wives of Bala and Malhari mortgaged their respective moieties to the defendant in 1901. In miscellaneous proceedings the creditors of Bala sought to attach his interest in these lands, but the attachment was raised on the ground that he had no attachable interest in these lands. The creditors filed a suit in 1905 to which both Bala and Malhari, and the wives of Bala and Malhari, named Kashi and Baku respectively, and also the present defendant mortgagee Madhavrao were parties. In that suit it was held that the conveyance to Devji was merely a nominal and sham transaction, that Bala was the true owner and that the conveyance was merely a device to defeat the claims of the creditors. Thereafter there was a litigation between the mortgagee and Thaku the daughter of Bala, who claimed to redeem the property as having inherited the equity of redemption belonging to her deceased mother. In that suit the mortgagee pleaded that the equity of redemption belonged to Bala and not to his wife. But it was held in that suit that the mortgagee was estopped from disputing the title of Kashi, the mother of the plaintiff in that suit, and the question whether as between Bala and his wife Kashi, the true owner was Bala was held to be outside the scope of that suit for redemption. That view was upheld by the High Court in S. A. No. 630 of 1920 decided on August 9, 1921. We are not concerned in this suit with that moiety of the two lands.

It appears that with regard to the other moiety, which originally belonged to Malhari, and which was conveyed to his wife, Baku, in the manner indicated, that it was put up for sale by the Collector in execution of a money decree in a small cause suit which the defendant-mortgagee had obtained against both Malhari and his wife Baku. Before the decree was executed both of them died, with the result that in execution

proceedings the son of Malhari was brought on the record as the legal representative of both the judgment-debtors, and in execution in July 1914, the right, title and interest of both the deceased judgment-debtors were put up for sale and purchased by one Trimbak Keshav Thakur, who in his turn sold the same to the present defendant, who was the decree-holder also.

The present suit was filed in 1921 by the daughter of Baku for redemption of the mortgage by Baku in 1901. The defendant pleaded that as a fact she had no right to redeem because the property really belonged, not to Baku, but to Malhari; and secondly, that as regards Survey No. 868, he had purchased the right, title and interest both of Malhari and Baku in the moiety, and, therefore, the plaintiff had no right to the equity of redemption.

On these pleadings the learned trial Judge found that the plaintiff was the heir of Baku according to Hindu law, as the daughter would be a preferential heir to her mother's *stridhan*, and that it was not open to the defendant to question the title of Baku from whom he had accepted the mortgage in 1901. He further held that the sale effected in 1914 in the Darkhast of 1912 was an invalid sale, and that it was void and inoperative against the true heir of Baku as in the execution proceedings according to the learned Judge, Baku could not be properly represented by her son on the ground that he was not the heir of his mother but his sister would be the proper heir. In coming to this conclusion the learned Judge relied upon the observations in *Khiarajmal v. Daim* (1). The learned Judge found that the mortgage amount was satisfied from the proceeds of the property and that nothing was due on the mortgage, and accordingly passed a decree declaring that the mortgage was fully satisfied and that the plaintiff was entitled to redeem and recover possession of the property in suit.

(1) [1904] 32 Cal. 296=32 I.A. 23=1 C.L. 584=9 C.W.N. 201=2 A.L.J. 71=7 Bom L.R. 1=8 Sar. 734 (P.O.)

The defendant appealed to the District Court, and the learned First Class Subordinate Judge, with appellate powers, who heard the appeal, came to the same conclusion on the two main questions in the appeal and dismissed the appeal with costs.

The defendant has appealed to this Court, and it is urged in support of the appeal, first, that it is open to him to show that the real owner of the property was not Baku, who mortgaged the property to him, but her husband Malhari, and that if that be the case, the plaintiff would not be entitled to redeem. Secondly, it is urged that in any case his title to a moiety in Survey No. 863, which was sold in 1914, and ultimately purchased by him, gives him a title to that property as against the plaintiff.

As regards the first point, it is clear that the defendant as mortgagee cannot be allowed to question the title of his mortgagor Baku, and that for the purposes of the suit it must be taken that Baku was the owner. If that be so, it is not disputed that the plaintiff as the daughter of Baku would inherit the right of Baku to the equity of redemption, and as such would be entitled to maintain the suit. Whatever the rights to this property as between Baku and Bala may have been, it is not open to the mortgagee to question the title of his mortgagor in this suit. It was so held by the Court in a similar suit by the daughter of Bala against the defendant in S. A. 630 of 1920. The first point must, therefore, be disallowed.

The other question whether the sale held in execution of the decree against Malhari and Baku is valid or not, is more difficult. It must be remembered that the money decree was against both Malhari and Baku, and the interest of both, whether in fact Malhari was the owner or his wife Baku was the owner of the moiety in these two Survey Numbers, was liable to be put up for sale in satisfaction of that decree. No proceedings with reference to the sale in execution of this decree have been put in. At least our attention has not been drawn to any paper

except the sale certificate. That certificate shows that the right, title and interest of both were purchased by the auction purchaser. It is true that in these execution proceedings, the person brought on the record as representing both the deceased judgment debtors was their son. It is urged that as the real heir of Baku, namely her daughter, was not on the record in the execution proceedings, the sale cannot be treated as binding upon her. That is the only irregularity in the execution proceedings relied upon as vitiating the sale and the question is whether that irregularity, such as it is, is sufficient to vitiate the sale.

In the present case, as I have already said, both Malhari and Baku were parties to the decree, and at any rate it was known to the decreeholder who was a party as the mortgagee to the suit of 1905, that it had been held that the real owner of the moiety in these two lands was Malhari, and not Baku, as the sale in favour of Devji by Malhari and Bala was held to be a colourable transaction. He no doubt brought the son on the record as the legal representative of his father and also of his mother. It is true that there was no investigation by the Court, and the position possibly did not lend itself at the time to any further investigation. In other respects the proceedings were regular, and it must be taken that the sale was held in the presence of the son of Malhari and Baku. Under these circumstances, I am not prepared to hold that the sale was void and invalid. It is quite true that the daughter is the heir of her mother in respect of her *stridhan* property, but the mere fact that the son was brought on the record as the legal representative of both his father and mother is not sufficient to invalidate the sale under the circumstances of this case. Undoubtedly he was the true legal representative of Malhari, and the sale was brought about in execution of a decree, under which both Malhari and Baku were liable. The question as to whether Malhari or Baku was the true owner of this land was, to say the least, not free from doubt in view

of the result in the suit of 1905. Thus it is difficult to say that the decree-holder had no justification whatever to treat the son as the proper legal representative for the purposes of execution proceedings.

There is a further ground to support the view that the representation of the deceased debtor was not defective: it is based upon a rule of Hindu law which has not been referred to in the course of the argument. As the conclusion can be properly reached without reference to that rule, I do not desire to rest my decision thereon. I may, however, refer to the rule, which is contained in the Mitakshara, Ch. I, S. 3, placita 9 and 10 (see Stokes, Hindu Law Books, p. 383, and Gharpure's translation of the Vyavahara Adhaya of the Mitakshara, page 189.) After referring to the text of Yajnavalkya that "The daughters share the residue of their mother's property, after payment of her debts, Vijnaneshwara points out in his commentary as follows:—"A debt, incurred by the mother, must be discharged by her sons, not by her daughters; but her daughters shall take her property remaining above her debts."

The same view is accepted by Nilkantha in the Vyavahara Mayukha (Mandlik's Hindu Law, p. 97 and Gharpure's Translation of Vyavahara Mayukha at p. 134, placita 12 of Chapter IV, S. 10.) Thus as regards her debt payable under the decree, if the son were brought on the record it would not be unjustified. I do not say more on this point, as it has not been adverted to in the arguments.

In a case of this kind, where we are concerned with the validity of the sale otherwise regularly held in the course of execution taken out in respect of a decree against her, I do not see any objection to the son having been brought on the record under the circumstances of this case. The omission to bring the daughter on the record is not, in my opinion, sufficient to invalidate the sale. As in *Khiarajmal v. Daim*, (1) it cannot be said here that Baku was not a party to the suit, nor can it be said that the judgment-debtors were alto-

gether unrepresented. Even admitting the irregularity in the representation, which I doubt according to the rule of Hindu law which I have referred to, I do not think that it is anything more than a mere irregularity in procedure in execution of a decree properly obtained against the mother, which cannot affect the substance of the matter. Each case must depend upon its facts and circumstances. I think that in the present case it is merely a case of irregularity, and not of such want of representation as would amount to an absence of jurisdiction on the part of the Court to carry out the sale. I am, therefore, of opinion that the sale must now be accepted as valid even as against the present plaintiff.

The result must, therefore, be that she would have no right to the moiety in Survey No. 868. I would, therefore, modify the decree of the lower appellate Court by dismissing her claim as regards Survey No. 868. Each party to bear his or her own costs throughout.

Fawcett, J.—I agree in allowing the appeal and in the order as to costs proposed by my learned brother. I think the decision in the suit of 1905, to which the plaintiff's mother Baku and defendant were parties (see Exhibit 38), has the conclusive effect of showing that, so far as the land in suit is concerned, Baku was a mere benamidar of her husband Malhari. As such benamidar, her proper representative was her son rather than her daughter, the plaintiff. In the circumstances of the case, the mere omission to bring the plaintiff on the record does not, in my opinion, make the sale under the execution proceedings of 1914 a nullity. It is somewhat similar to the omission of Nabibaksh's infant daughter, which was held immaterial in the Privy Council case of *Khiarajmal v. Daim* (1) and I think the case is one which can be held to fall under the discretion properly exercisable by a Court in allowing the estate of a deceased debtor to be represented by one member of the family, such as is referred to by Lord Davey at p. 314 of that report.

Decree modified.

1925 Bombay 129 (1).

MACLEOD, C.J. AND CRUMP, J.

(Augustin Manwal) Perira—Complainant

v.

Duming Pascol Demello—Accused.

Crim. Ref. No. 84 of 1924, decided on 5th November, 1924, by the Sessions Judge, Thana.

Crim. Pro. Code, S. 250 (3).—Appeal lies when compensation exceeds Rs. 50 whether payable to one or more accused.

Whenever a complainant or informant has been ordered under sub-S. (2) to pay compensation exceeding fifty rupees the right of appeal is given, whether compensation has been awarded only to one accused or has to be distributed amongst a number of accused in sums not exceeding fifty rupees. In other words in a case where the total compensation awarded is over fifty rupees, the complainant is entitled to appeal. [P. 129, C. 1.]

R. J. Thakor—for the Complainant.

G. N. Thakor—for the Accused.

Macleod, C.J.:—In this case the complainant was called upon to show cause why he should not pay compensation to the accused, under section 250, Criminal Procedure Code. An order was thereafter made that as the complainant was unable to show cause, he should pay Rs. 20 to each of the accused Nos. 1, 2, 3 and 4, Rs. 40 to No. 6 and Rs. 100 to No. 5. An appeal was filed under sub-section (3) of section 250. The learned Sessions Judge appears to have been of opinion that the appeal was only competent as regards the Rs. 100 awarded as compensation to accused No. 5, and that he could not deal with the amounts awarded to the other accused because they were under Rs. 50. Accordingly he referred the case to this Court, asking this Court to pass a similar order with regard to the compensation awarded to the other accused as was passed by him in the case of accused No. 5. We think that the Sessions Judge has placed a wrong construction on section 250, sub-section (3) as in our opinion that sub-section means that whenever a complainant or informant has been ordered under sub-section (2) to pay compensation exceeding fifty rupees, the right of appeal is given, whether compensation has been awarded only to one accused or has to be distributed amongst a number of accused in sums not exceeding Rs. 50. To put the construction suggested by counsel for the accused on

1925 B/17 & 18

this sub-section would inevitably cause the difficulty which has resulted from the present decision of the Sessions Judge.

We think, therefore, that in a case where the total compensation awarded is over Rs. 50, the complainant is entitled to appeal. The papers can be returned to the Sessions Judge with this expression of our opinion that he has jurisdiction to deal with the whole of the order awarding compensation.

Case remitted.

1925 Bombay 129 (2).

SHAH, AG. C.J. AND KINCAID, J.

Manjaya Sannaya Shanbhog and others—Plaintiffs-Appellants

v.

Seshagiri Shambhuling Upadhya and others—Defendants-Respondents.

S. A. No. 372 of 1922, decided on 22nd August, 1924, from the decision of the District Judge, Kanara, in Appeal No. 67 of 1920.

Hindu Law—Alienation by widow—Consent of presumptive reversioners at the date of alienation does not estop actual reversioners—Surrender in favour of one is not equal to surrender to all.

The consent of the whole body of reversioners at the date of the alienation would afford presumptive evidence of necessity but would not estop the actual reversioners from disputing the alienation unless the consenting reversioners themselves were the actual reversioners at the date when the reversion fell due. A Hindu widow can renounce in favour of the nearest reversioner, if there be only one, or of all the reversioners nearest in degree, if more than one, at the moment but a surrender to one of the reversioners is not equivalent to a surrender to all the reversioners, even if it is for the benefit of all the reversioners. [P. 180, C. 2 and P. 181, C. 1.]

H. C. Coyajee and G. P. Murdeshwar—for the Appellants.

G. S. Mulgaonkar and D. R. Ugrankar—for the Respondents.

Shah, A.C.J.:—The genealogical table showing the necessary relationship is given at page 3 of the print. One Subbaya had two sons, Timmanna and Puttaya. Timmanna adopted as his son one Narayan. Narayan died before 1873, leaving a widow Timmamma. In 1873 the four sons of Puttaya, the brother of Timmanna, one named Sannaya alias Subbaya by his first wife, and three named Shambhulinga, Timmanna and Subbaya, by his second wife, were alive. In 1873 Timmamma, the

widow of Narayan, alienated the whole of her estate to Shambhulinga. Shambhulinga afterwards sold these properties to different persons by different sale-deeds. Three of the sale-deeds executed in 1877 by Shambhulinga in favour of the purchasers from him were attested by Subbaya, the step-brother of Shambhulinga. These alienees obtained possession of these properties and continued in possession until the death of Timmamma in April 1913. At the time of her death the reversioners were the two sons of Subbaya, namely, Manjaya and Krishnaya, and Venkatraman, the son of Timmamma as shown in the pedigree. Ganpati, the brother of Venkatraman, had died before that date. Manjaya filed the present suit in 1919 as a reversioner claiming possession of these properties on the ground that the alienation made by the widow in favour of Shambhulinga was not for legal necessity and ceased to be operative on the death of the widow. The transferee of his interests joined with him as plaintiff No. 2.

The defendants are several alienees from Shambhulinga and the two other reversioners, namely, Krishnaya and Venkatraman. The defence of the alienees was that the sale by the widow to Shambhulinga was for legal necessity and with the consent of all the reversioners at the date of the sale.

The trial Court raised several issues. Two of them are material for our present purpose. Issue No. 4 was: "Were the alienations for legal necessity?" The finding was in the negative. Issue No. 11 was: "Is it proved that the alienations in question were made with the consent of the next reversioners?" The learned Judge was satisfied that the alienations by the widow in favour of Shambhulinga were not for legal necessity, but he came to the conclusion that they were with the consent of all the brothers of Shambhulinga including Sannaya and that it was for their common benefit. This conclusion is based upon the circumstance that Sannaya attested three of the sale-deeds passed by Shambhulinga to the purchasers from him. It appears from the judgment of the trial Court, and it cannot be disputed, that there is no other evidence in the case either with regard to the consent of all the reversioners at the date of the alienation by the widow or that this alienation was for the common benefit of all the then reversioners. It is not suggested

in the present case that there was any consent of the actual reversioners, that is, of the plaintiff and defendants Nos. 14 and 15, who were the reversioners when the reversion opened. The trial Court dismissed the suit with costs on the ground that in view of his finding, the transaction by the widow was to be treated as acceleration of the reversion and as the surrender of the entire estate for the benefit of all the then reversioners although in the name of Shambhulinga alone.

The plaintiffs appealed to the District Court and the learned District Judge accepted in its entirety the view taken by the trial Court and confirmed the decree of that Court.

In the appeal before us it is contended that the lower Court erred in applying the doctrine of acceleration to this case. It is further contended that the inference drawn by the lower Court as to the consent of Subbaya is not justified as it is exclusively based upon the only circumstance that he attested some of the sale-deeds in 1877. As both the Courts have found that there was no legal necessity, it is not necessary to deal with that part of the case. It may be accepted that the alienation by Timmamma in favour of Shambhulinga in 1873 cannot be justified on the ground of necessity. It is also common ground that there is no consent of the actual reversioners. The consent of the whole body of reversioners at the date of the alienation would afford presumptive evidence of necessity but would not estop the actual reversioners from disputing the alienation unless the consenting reversioners themselves were the actual reversioners at the date when the reversion fell due. This position is made clear in *Rangasami Goundan v. Nachiappa Goundan* (1). Their Lordships considered *Bajrangi v. Manokarnika* (2) and stated the effect at page 86 of the report in *Rangasami v. Nachiappa* (1). The only ground, therefore, that remains to be considered is whether the lower Courts were right in applying the doctrine of

(1) (1919) 42 Mad. 513=46 I.A. 72=36 M.L.J. 493=17 A.L.J. 536=29 C.L.J. 539=21 Bom. L.R. 640=23 C.W.N. 777=(1919) M.W.N. 262=50 I.O. 493=26 M.L.T. 5=10 L.W. 105 (P.C.).

(2) (1907) 30 All. 1=35 I.A. 1=9 Bom. L.R. 1848=12 C.W.N. 74=6 C.L.J. 766=17 M.L.J. 605=5 A.L.J. 1=11 O.C. 78=3 M.L.T. 1 (P.C.).

acceleration to this case. It is an admitted fact that the alienation was in favour of Shambulinga alone. There is hardly any justification for the inference which the lower Courts have accepted that it must be taken to be for the benefit of all the four reversioners at the date of the alienation. It is based upon the only circumstance that Subbaya attested the sale deeds by Shambulinga in 1877. The essentials of a valid surrender by a Hindu widow of her estate are stated in *Rangasami v. Nachiyappa* (1). A Hindu widow can renounce in favour of the nearest reversioner, if there be only one, or of all the reversioners nearest in degree, if more than one, at the moment, and that the surrender must be of the whole estate. In the present case the alienation in question related to the whole estate but it was in fact a surrender in favour of one of the reversioners and not all the reversioners of the same degree. At the date of the alienation there were four reversioners of the same degree and it is not possible in my opinion to extend the doctrine of surrender by a Hindu widow in the manner in which the lower Courts have extended it. No authority is cited in support of the proposition that the surrender to one of the reversioners is equivalent to a surrender to all the reversioners, if it is for the benefit of all the reversioners. Assuming, however, that the doctrine can be extended in that way we have to consider whether the inference drawn by the lower Courts is justified. It appears to us that it was open to the trial Court to draw an inference that the attestation by Subbaya to the documents in question was with knowledge of the contents of those documents. But it was hardly open to that Court to draw from that circumstance the further inference that he was a consenting party to the alienation by the widow in 1873. It may be said, however, that when he came to know in 1877 that Timmamma had alienated her property to Shambulinga, he acquiesced in that position. Even then the further finding that in 1873 the alienation in favour of Shambulinga was for the benefit of all the four reversioners at the time is purely conjectural and is based on no evidence. There is no valid surrender of her estate by the widow in this case.

We may mention that the three rever-

sioners take the estate equally. There is no question of claiming through their fathers in the present case as reversioners, and, therefore, though their shares have not been accurately stated in the plaint, it must be made clear that all the three are entitled equally to the estate.

We allow the appeal, reverse the decree of the lower appellate Court and pass a decree for possession in favour of the plaintiffs, the heirs of defendant No. 14, and defendant No. 15 against the other defendants. Plaintiffs should get their costs throughout from defendants other than the heir of defendant No. 14 and defendant No. 15. The heirs of defendant No. 14 and defendant No. 15 should bear their own costs throughout.

We make no order as to mesne profits prior to this date under the circumstances of this case. This is rather a hard case for the alienees and we think that the justice of the case will be met by allowing mesne profits from the date of this decree until the delivery of possession or the expiration of three years whichever event first occurs.

Mesne profits to be determined by the trial Court under Order 20, rule 12.

Appeal allowed.

1925 Bombay 131.

MARTEN AND FAWCETT, JJ.

Candri Bawoo—Accused-Applicant

v.

Emperor—Opposite Party.

Criminal Application for Rev. No. 202 of 1924, decided on 17th September, 1924, from an order of Additional Presidency Magistrate, Bombay.

Bombay Prevention of Prostitution Act (Bombay Act XI of 1923), Ss. 3 and 10 (1)—Arrest by police officer without complaint is illegal—Magistrate has no jurisdiction to try the accused.

A police officer, who is not specially authorised by the Commissioner of Police as required by S. 10 (1) cannot arrest a woman under S. 10 (1) without a complaint under S. 3 of the Act, and the Magistrate has no jurisdiction under S. 190 of the Crim. Pro Code, to try the woman so wrongly arrested for the offence, unless a complaint within the meaning of S. 4 (1) (h) is made to him. [P. 132, O. 2 and P. 138, O. 1.]

M. A. F. Coelho and *L. G. Pradhan*—for the Applicant.

S. S. Patkar—for the Crown.

Marten, J.—We have been engaged for over an hour and a quarter in considering

the question whether an alleged prostitute has been rightly fined Rs. 5. But the apparent minor nature of the offence is quite disproportionate to the points of general jurisdiction and policy involved.

Shortly stated, the accused alleges that she was wrongfully arrested under section 10 (1) of Bombay Act XI of 1923 (the Bombay Prevention of Prostitution Act, 1923) and that accordingly the Magistrate had no jurisdiction to hear the case and that consequently her conviction, notwithstanding her protest, was illegal.

Now under section 10 (1) :—

"Any police officer on complaint, and any police officer authorized in this behalf by the Commissioner of Police by special order without such complaint, may arrest without a warrant any person committing, in his view, any offence punishable under S. 3, if the name and address of such person be unknown to such police-officer and cannot be ascertained by him then and there."

The offence in question under section 3 is, to put it shortly, soliciting. I will assume for a moment that the name and address of the accused were unknown to the police officer who arrested her, and that it could not be ascertained by him then and there. It is common ground that this police officer had not been authorised by the Commissioner of Police by any special order to effect such an arrest. So there is no dispute on this point.

But it was said that this police officer had arrested her "on complaint" within the meaning of section 10 (1). As to that it was contended for the accused that the expression "complaint" meant a formal complaint as defined by section 4 of the Criminal Procedure Code. It was argued, however, by the prosecution that the true construction of section 10 (1) is that a complaint means a complaint oral or otherwise made to a particular police officer at or about the time when the offence in question is committed, and that it is not confined to a technical complaint within the meaning of section 4 of the Criminal Procedure Code. Assuming that to be so, there is no evidence here that any such complaint was in fact made to the police officer. Counsel for the accused who was also in the proceedings before the Magistrate tells us that no evidence whatever on that point was led by the prosecution, and that on the contrary the police admitted that there had been no complaint. The learned Government Pleader on instructions told us in reply that the police had received an

allegation about the accused the evening before the arrest and that was why they sent a police constable to this particular street the next day. But even if any such allegation made the day before the arrest could be such a complaint as is contemplated by section 10, as to which I say nothing, there is no evidence on that point and I accept counsel's statement that in the Court below nothing of the sort was ever said there.

That being so, it follows that the police officer in question cannot rely on section 10 of the 1923 Act to justify the arrest of the accused he made. In other words, the arrest was illegal.

That brings us next to section 190 of the Criminal Procedure Code. That section enables a Magistrate to "take cognizance of any offence (a) upon receiving a complaint of facts which constitute such offence; (b) upon a report in writing of such facts made by any police officer; (c) upon information received from any person other than a police-officer, or upon his own knowledge or suspicion, that such offence has been committed." Obviously sub-section (c) does not apply here. And if the arrest was illegal it is not contended that there was a report in writing by a police officer within the meaning of sub-section (b). But it is said that there was here a "complaint" within the meaning of sub-section (a). Now when one turns to section 4 (1) (h) of the Code, "complaint" means "the allegation made orally or in writing to a Magistrate, with a view to his taking action under this Code, that some person, whether known or unknown, has committed an offence, but it does not include the report of a police officer."

The answer made by the accused is that the only document before the Magistrate was the charge sheet and that this was not a complaint within the meaning of section 4 (1) (h) and that the report of a police officer is expressly excluded from the definition of a complaint. This charge sheet is the large brown paper document which is the ordinary document by which cognizable cases are put before the Magistrate by the police. But on the above findings this was not a cognizable case.

The prosecution next relied on *King-Emperor v. Sada* (1) in which it is said

(1) (1901) 26 Bom. 150 = 3 Bom. L.R. 586 (F.B.).

that a police officer can make a formal complaint in a non-cognizable case, and that it would not then be a report within the meaning of section 4 (1) (h). But, as my learned brother pointed out in the argument, the learned Judge says at page 155 :

"The proceedings show that the police constable purported to file a complaint, and in fact did file a complaint, on which the case was instituted against the accused person. The Magistrate to whom the complaint was made, and who took cognizance of the alleged offence, is a Third Class Magistrate. Therefore S. 190 (1) (c) is inapplicable (see schedule IV of the Criminal Procedure Code) and thus the Third Class Magistrate could only have taken cognizance under S. 190 (a) or (b), that is, upon receiving a complaint, or upon a police report."

It will be seen, therefore, that in that particular case there was an ordinary formal complaint filed in the ordinary way. But here I am unable to look upon this charge sheet as a complaint within the meaning of section 4 (1) (h). It was not intended to be such, nor is that its normal use.

Then it was argued that even supposing the arrest was illegal the Magistrate could still hear the case and that the conviction should not be set aside. The only Bombay case cited to us is *Emperor v. Vinayak Damodar Savarkar* (2). But that was a totally different case where it was alleged that the arrest of the accused outside British India (*viz.*, in Marseilles) was illegal, and therefore his subsequent arrest in India when the ship reached Bombay was illegal. The Court there held that the Indian Courts were not concerned with the question whether the arrest in a foreign country was legal or illegal. Here we have nothing of that sort whatever. It is the case of an Indian subject being wrongfully arrested in India under Indian law.

Then two other cases of *Emperor v. Ravalu Kesigadu* (3) and *Emperor v. Madho Dhobi* (4) were cited. As far as *Emperor v. Ravalu Kesigadu* (3) is concerned, that was a case under the Madras Abkari Act, and the question there was whether a revenue officer or excise officer had made an arrest outside a particular circle or area. It was said that there had been a particular Government Notification which narrowed his circle in such a way that the particular place of arrest was outside it and therefore

the arrest was illegal. As I read the judgment of the Court they held that this Government Notification did not affect the powers of arrest by this particular officer, whether or no this circle or area was altered in the way I have mentioned. They say (p. 125) :—

"He (the Magistrate), however, acquitted them on the ground that the officer who arrested them was an officer who, under the terms of the notification of November 24, 1899, had only authority within the area of his circle and that when he arrested the accused he was acting outside that area. The notification in question did not, and could not, operate so as to limit the powers conferred upon officers by S. 84 of the Act."

That being so, it seems to me that was sufficient to dispose of the case, *viz.*, that the officer had power to arrest. It is true the Court went on to say (p. 125) :—

"The question whether the officer who effected the arrests was acting within or beyond his powers in making the arrest does not affect the question of whether the accused were guilty or not guilty of the offence with which they were charged. The Magistrate had jurisdiction under S. 190 of the Criminal Procedure Code to take cognizance of the offence."

Then in *Emperor v. Madho Dhobi* (4) the judgment at page 560 states :—

"Section 55 of the Code is, however, expressly applicable; so the arrest of Madho Dhobi by Inspector Hamilton, who says he is in charge of a police station in Calcutta, appears to have been quite legal."

That being so, this appears to me to be another case where the Court on the facts of that particular case came to the conclusion that the arrest was legal. Consequently any observation made to the effect that it did not matter whether the arrest was legal or illegal would appear, with great respect, to be obiter.

In the present case we have a Bombay Act to consider the effect of. It is a new Act, and, as I read section 10, it has been deliberately inserted so as to afford reasonable protection to the public. An ordinary police constable is not to be allowed to arrest any female in a street unless a complaint has been made to him of her conduct, and unless he himself sees the offence committed, and he cannot discover her name and address. Or, on the other hand, the constable must be authorized by the Commissioner of Police by a special order to effect an arrest of this description, and one can quite understand the reason for this, *viz.*, to ensure that mistakes should not be made and that some innocent woman should not be dragged off to prison or put

(2) (1910) 85 Bom. 225—18 Bom. L.R. 296—10 I.O. 958—12 Or. L.J. 856.

(3) (1902) 26 Mad. 124.

(4) (1903) 31 Cal. 557—7 O.W.N. 661.

under arrest in the public street by any ordinary police constable.

One knows that mistakes of that kind by the police in England have led to strong public criticism. I remember in particular many years ago one case at Cambridge where a mistake of that nature by the University Proctors led to interference by Parliament and a public inquiry, as a result of which the jurisdiction of the University authorities to arrest women in the streets on an accusation of soliciting was taken away from them altogether.

I, therefore, regard this case as one of some public importance. I am certainly not inclined to stretch a point and hold that the arrest, though illegally made, did not affect the powers of the Magistrate subsequently to hear the case. And when I find here that the question of jurisdiction was taken before the Magistrate at the outset of the proceedings, then in my opinion the proper course for us to do, if we come to the conclusion as we do that the Magistrate had no jurisdiction to hear the case, is to quash the proceedings and to direct the fine, if paid, to be refunded.

That accordingly is the order which I would pass.

Fawcett, J.—The question before us is whether the Presidency Magistrate had jurisdiction under section 190 of the Criminal Procedure Code. The learned Government Pleader argues that whether the accused was validly arrested or not has nothing to do with the question whether she was properly convicted of the offence alleged against her. But in this particular case, in my opinion, the validity of the arrest is a question which does materially affect the question of jurisdiction. It is not the case that a police officer is generally authorised to arrest a person committing in his view the offence of soliciting, which is made punishable by section 3 of Bombay Act XI of 1923. If that had been so, then no doubt the Government Pleader's argument might be valid. But here a very restricted power of arrest is given and certain conditions are laid down as to the circumstances under which that power can be exercised. The ordinary rule of construction regarding penal statutes requires that those conditions should be strictly complied with before a Court can hold that there has been a proper arrest. And I shall show shortly why this question of proper arrest affects the question of jurisdiction.

When you come to section 190, in order to bring a case put up in the way, this one was within the cognizance of the Magistrate, it would have to fall under clause (b) of section 190, *viz.*, upon a police report of the facts constituting the offence. I have not the slightest doubt that the charge sheet, which was the method employed for bringing the accused before the Court, was meant to be an ordinary police report within the meaning of that clause. It is a report made in the form prescribed by section 72 of the Bombay City Police Act, 1902, containing exactly the information that is there prescribed, *viz.*, (a) the names of the parties; (b) the nature of the information; (c) the names of the persons who appear to be acquainted with the circumstances of the case; and (d) a statement showing whether any person accused in such case has been arrested or has been released on his bond, and if so, whether with or without sureties. That information, including the fact of this accused being arrested, is contained, in this document, and it was sent up in the ordinary way as a report by the police in regard to a cognizable offence.

I think that is clear, and I do not understand the Government Pleader to have disputed the position, that to bring a report within clause (b) of section 190, it must be a report which is validly made in accordance with the law governing a police investigation and the committing of an accused to a Magistrate's Court.

That being so, it follows from the provisions of sections 57 and 58 of the Bombay City Police Act, that a valid report by a police officer in the town of Bombay of the kind contemplated by clause (b) of section 190 can only be made (1) in the case of a cognizable offence and (2) when it contains information of a cognizable offence which he has been authorized by a Presidency Magistrate to investigate.

But the present case satisfies neither of those two conditions. It is not alleged that in this case any authority had been given by the Magistrate to the police to investigate it, and the origin of the charge shows that this could not have been done.

We have, therefore, to consider whether this was a cognizable offence, and for that purpose one has to look at section 3 of the Bombay City Police Act, which says that the phrase "cognizable offence" shall have the meaning assigned thereto by the

Code of Criminal Procedure. Consequently an offence to be cognizable must be one in which a police officer could arrest without a warrant under any law for the time being in force in Bombay City. I have already mentioned that there are very serious limitations on the power of arrest under this section 10 and I am clearly of opinion that any case where those conditions are not complied with, cannot be described as a cognizable case.

Here we have the fact, as my learned brother has pointed out, that there is no evidence to show that the police officer who made the arrest did so "on complaint" within the meaning of section 10, and the apparent facts go against there having been any such occasion for the arrest. The officer who made the arrest was also not specially authorized in that behalf in the manner required by this section. Therefore in my opinion the police report that was made is not a valid report, which could give the Magistrate jurisdiction under clause (b) of section 190.

As regards the contention that it can be treated as a complaint under clause (a) of section 190, I think it is clear that it was not intended to be such a complaint; it is not in the form in which a complaint is ordinarily made; and the Magistrate was not asked to issue process on the complaint, the accused having already been arrested. The authorities relied upon by the learned Government Pleader in this respect have already been sufficiently commented upon by my learned brother, with whom I agree.

Therefore it seems to me that this is a case where the Magistrate had no real jurisdiction, and that consequently it is not one which can be held to fall within the scope of mere irregularities dealt with in section 537 of the Criminal Procedure Code.

In the result I concur with the order proposed by my learned brother. At the same time I quite realise that the Court should not be too technical in matters of this kind; and if it had not been a clear point of jurisdiction I should have been very disinclined to interfere. But the police can easily make arrangements to meet the difficulty that has arisen in this case, and I do not think our decision should result in any material interference with the proper carrying out of their duties under the Act of 1923.

Order set aside.

1925 Bombay 135.

MARTEN AND FAWCETT, JJ.

Emperor

v.

Maria Basappa.

Crim. Ref. No. 78 of 1924, decided on 10th October, 1924, by the District Magistrate, Dharwar.

Crim. Pro. Code, S. 339 (1)—Certification by Public Prosecutor is absolutely necessary.

Sub-s. (1) of S. 339 as amended by Act of 1923 makes the certificate by a Public Prosecutor the sole basis of a prosecution of an approver and therefore an approver cannot be prosecuted at the instance of a suggestion by the presiding Judge that he should be so dealt with. [P. 137, C. 1.]

S. S. Patkar—for the Crown.

Marten, J.:—This is a reference by the District Magistrate of Dharwar recommending that the proceedings now pending against the present accused in the Court of the First Class Magistrate of Gadag on a charge of murder under section 302 should be quashed on the ground of the illegality of the proceedings.

The accused was admittedly an approver in a murder case in which he was granted a full pardon under section 337 of the Criminal Procedure Code. That being so, that pardon was a bar to any criminal proceedings being taken against him in respect of his complicity in the murder subject to any other provisions of the Criminal Procedure Code. Those other provisions will be found in section 339 which provides that where such a pardon has been tendered, and the Public Prosecutor certifies that in his opinion any person who has accepted such tender has not complied with the condition on which the tender was made, such person may be tried for the offence in respect of which the pardon was so tendered.

Admittedly here the Public Prosecutor has given no such certificate, but notwithstanding that the learned Sessions Judge of Dharwar at the termination of the trial directed that the approver be put before a Magistrate, and that the Public Prosecutor be authorised to file a complaint against the approver and he ordered that the approver should be discharged and re-arrested and remanded to prison and should be produced before a Magistrate when called upon.

That is the order on which the present complaint before the Magistrate is founded. The letter of reference points out that the

very complaint itself is wanting in the necessary condition before it can be enquired into, viz., the certificate of the Public Prosecutor under section 339. In our opinion that objection is a sound one. The order of the learned Sessions Judge would seem to have been made *per incuriam*, and in our opinion it cannot be supported.

If one looks at the matter in principle, there is all the more reason to construe these sections strictly. The accused under one section has been given a pardon. If, therefore, he is subsequently to be tried for his life, it is only fair and proper that the specific directions of the Code which enable that to be done should be strictly complied with. We get here a specific condition, viz., that the Public Prosecutor has to make a certain certificate. This he has not done. How then in common fairness can the accused be now prosecuted for this crime? It seems to me that although there may be other reasons, for the insertion of this particular provision, the Public Prosecutor is the proper person to give such a certificate. I take it that in the districts he has very much the same sort of duties to perform in criminal matters as the Advocate General of Bombay has for the Bombay Presidency as a whole or the Attorney General has in England. He has access to all information in the possession of Government in relation to any offence, and consequently is often in a much better position to say whether a particular prosecution should be withdrawn or proceeded with than the Judge whose duties are solely confined to the evidence before him.

It is conceivable that on the evidence admissible before him, a particular trial Judge may come to a particular conclusion. It is equally possible that if it was admissible at a trial to have all possible information placed before him whether it was strictly speaking legal evidence or not, he would have arrived at a different conclusion. However that may be, to my mind there can be only one construction possible of this section, and that construction is not the one which the Assistant Public Prosecutor of Dharwar who has come here in person to support the learned Sessions Judge's decision has asked us to adopt.

Nor if one turns to earlier decisions before the recent statutory amendment

necessitating a certificate from the Public Prosecutor, does it appear that a Sessions Judge in former days could properly have adopted the course which the learned Sessions Judge has taken in the present case? We have been referred to three cases, viz., *Emperor v. Kothia* (1), *Emperor v. Gangua* (2) and *Emperor v. Abani Bhushan* (3). These are all cases before the recent amendment, and they all go to show that the proper person to sanction the prosecution of an approver on the ground that he had broken his pardon is the District Magistrate and not the Sessions Judge. The judgment in *Emperor v. Gangua* (2) is particularly clear on that point. However, that is now obsolete law. So we need not go into that nor discuss the case to the opposite effect in *Chanan Singh v. The Crown* (4) which the Assistant Public Prosecutor of Dharwar drew our attention to.

In our opinion the proceedings in question here are illegal, and the rule *nisi* should be made absolute. We will also direct that the present complaint be withdrawn and that the approver be discharged from custody.

Fawcett, J.—I concur. It has been urged in support of the learned Sessions Judge's order that he has inherent jurisdiction in spite of the provisions of section 339, sub-section (1), to make that order. No doubt it has been laid down by this Court in *In re Ganesh Narayan Sathe* (5) that as a general rule it is the right, and in some cases also the duty, of any person having knowledge of the commission of an offence to set the law in motion, even though he is not personally interested or affected by the offence. But that general rule is of course subject to statutory exceptions, and the present case is, in my opinion, clearly one of them. The pardon that was given to the approver *prima facie* acts as a bar to any prosecution of the approver for the offence in respect of which the pardon was tendered, or in respect of any other offence of which he appears to

(1) (1906) 30 Bom. 611=8 Bom. L.R. 740=4 Cr. L.J. 346.

(2) (1915) 37 All. 331=16 Cr. L. J. 483=29 I.C. 323=13 A.L.J. 424.

(3) (1910) 37 Cal. 845=8 I.C. 721=11 Cr. L.J. 707.

(4) (1919) 1 Lab. 218=21 Cr. L.J. 518=56 I.O. 774=108 P.L.R. 1920.

(5) (1889) 13 Bom. 600.

be guilty in connection with the same matter, except so far as the legislature may authorize a prosecution in such a case, and the effect of sub-section (1) of section 339, as it now stands, is clearly to make the certificate by the Public Prosecutor the sole basis of a prosecution of an approver. It is not suggested that there are other provisions, such as Chapter XXXV of the Criminal Procedure Code, under which a Sessions Judge's order directing a complaint can be justified and the general rule of construction applies, *expressio unius est exclusio alterius*. Therefore it is only under the conditions specified in sub-section (1) of section 339 that the approver can be prosecuted, as the Sessions Judge proposes to prosecute him.

Rule made absolute.

1925 Bombay 137.

SHAH, A.C.J. AND KINCAID, J.

Nariman Rustomji Mehta—Defendant-Appellant

v.

Hasham Ismayal—Plaintiff-Respondent.

Civil App. No. 203 of 1924, decided on 18th August, 1924.

(a) *Limitation Act, S. 5 and Art. 179*—Time taken up for review should be excused.

In computing the period of limitation for an application for leave to appeal to Privy Council, the time taken up for review of the judgment sought to be appealed against should be excluded. [P. 137, O. 2.]

(b) *Civ. Pro. Code, S. 110*—Value in partnership suits is calculated on the appellant's share and on the whole property.

On principle it can make no difference on the point of valuation for purposes of appeal to Privy Council whether a suit is a partition suit or a partnership suit. It is the value of the appellant's share and not the whole of the property that determines the value of the subject-matter. [P. 138, O. 1.]

J. R. Gharpure—for the Applicant.

K. H. Kelkar—for the Opponent.

Shah, A. C. J. :—This is an application for leave to appeal to His Majesty in Council. The application was filed on February 12, 1924. The decree sought to be appealed from was passed on February 9, 1923. The application is, therefore, beyond time, and the first question is whether the delay in presenting the application should be excused. The reason relied upon for excusing the delay is that the petitioner filed an application for a

review of the decree, now sought to be appealed from, on April 13, 1923. On that application a rule was granted by this Court in September 1923, and that rule was discharged on February 11, 1924. It is urged that as the petitioner was pursuing the remedy by way of review, the time taken up from April 13, 1923, up to February 11, 1924, should be excused under section 5 of the Indian Limitation Act and reliance is placed upon the decision in *Brij Indar Singh v. Kanshi Ram* (1).

In the present case, having regard to the fact that the petitioner was prosecuting this application in good faith, we think that the time occupied in prosecuting that application should be deducted in calculating the period of limitation for presenting the application for leave to appeal to His Majesty in Council. If that time is deducted, it is clear that the application is within time.

We, therefore, make the rule absolute on the application for excusing delay, and order the costs of the rule to be costs in the rule on the main application.

As regards the application for leave to appeal to His Majesty in Council, the trial Court had dismissed the suit, and in appeal this Court passed a decree for dissolution, and directed an account of the partnership to be taken. The case was remanded to take accounts. Under section 110, therefore, of the Code of Civil Procedure, if the petitioner, who is the original defendant, can show that the subject-matter involved in this appeal is worth Rs. 10,000 or more he would be entitled to the necessary certificate. On this point, he relies upon the 2nd paragraph of section 110, because it is clear on the facts of this case that the amount or value of the subject-matter of the suit in the Court of first instance, or the amount or value of the subject-matter in appeal cannot be shown on the present materials to be Rs. 10,000 or upwards. It is urged that the decree or final order directly or indirectly involves a claim or question respecting property of the amount or value of Rs. 10,000 or upwards. Beyond the

(1) (1917) 45 Cal. 94 = 44 I.A. 218 = 19 Bom. L.R. 866 = 33 M.L.J. 486 = 22 M.L.T. 862 = 42 I.C. 43 = 3 Pat. L.W. 313 = 15 A.L.J. 777 = 6 L.W. 592 = 126 P.W.R. 1917 = 26 O.L.J. 572 = 104 P.R. 1917 = (1917) M.W.N. 811 = 22 C.W.N. 169 = 127 P.L.R. 1917 (P.C.).

mere statement in the petition there is nothing to support this statement. No affidavit has been filed. The plaintiff values his share in the plaint provisionally at Rs. 5,001. The same valuation was accepted for the purposes of the appeal to this Court; and for the first time it is alleged in the petition that the value is more than Rs. 10,000.

It is contended that the property for this purpose must be taken to be the whole of the partnership property. No authority is cited in support of that proposition. The decision of this Court in *De Silva v. De Silva* (2) is against this contention.

That was a case of partition; but on principle it can make no difference on this point whether it is a partition suit or a partnership suit. It is the value of the appellant's share and not the whole of the property that should be looked to. The petitioner can succeed only if the value of the whole of the partnership property is taken as the basis for determining the amount or value of the property affected by the decree. That cannot be done; and there is no allegation that the value of the share of the defendant is Rs. 10,000 or more. We, therefore, discharge the rule with costs.

Kincaid, J.—I agree.

Rule discharged.

(2) (1904) 6 Bom. L.R. 403.

1925 Bombay 138.

MARTEN AND FAWCETT, JJ.

Emperor

v.

Namdeo Lakman—Accused.

Cr. Ref. No. 90 of 1924, decided on 1st October, 1924, made by Acting Sessions Judge, Poona.

Crim. Pro. Code, S. 263 (h)—Non-compliance is curable under S. 537, if conviction is right.

Omission to comply with cl. (h) of S. 263, i.e., omission to briefly record reasons for finding is a mere irregularity curable under S. 537 where in a non-appealable case it appears that there is clear evidence justifying the conviction. [P. 139, C. 1.]

The accused was not represented.

Marten, J.—This is a reference by the acting Sessions Judge of Poona with respect to the conviction of accused Nos. 1 and 2 for voluntarily causing hurt under

section 323, Indian Penal Code. The ground on which the learned Judge recommends to us that the conviction and sentence should be quashed is that the Magistrates recorded evidence at some length, but omitted to record any statement of their reasons for such conviction as required by section 263, Criminal Procedure Code. Then the letter of reference says that there was delay in lodging the complaint; that the excuse that the complainant could not make the complaint earlier was false; that she alleged that she was an in-door patient, whereas her injuries were slight and she was treated as an out-door patient only; and that certain discrepancies in the evidence rendered the above defect more than a formal defect.

The dispute in this case was a family squabble. The complainant is the mother-in-law and accused No. 1 is her son-in-law. The remaining accused were relations of the son-in-law. The Magistrates heard the case, and took down a considerable body of evidence for the prosecution. The defence pleader said he had no evidence to call on behalf of the defence. The order was: "Accused Nos. 1 and 2 are convicted and sentenced to pay a fine of Rs. 15 each, or in default to suffer simple imprisonment for ten days. Section 323, Indian Penal Code. Benefit of doubt is given to accused Nos. 3 and 4, and they are therefore acquitted." In effect the Magistrates were chivalrous enough to give the benefit of the doubt to the two ladies accused Nos. 3 and 4, and to impose on the men accused Nos. 1 and 2 a small fine.

We have read the evidence, and there is undoubtedly ample evidence to justify the finding that the complainant, the mother-in-law, was attacked and injured by accused Nos. 1 and 2. The trouble arose apparently over an alleged right of way which the accused's party were trying to block up. We fully recognise the importance of the directions in section 263, Criminal Procedure Code, and that the Magistrates should strictly adhere to them. We also think that it was quite proper of the learned Sessions Judge to draw our attention in this particular case to the omission by the Magistrates to comply strictly with the directions in that section.

But, on the other hand, there is another section to be considered, namely, section 537, Criminal Procedure Code,

which gives us a discretion not to interfere in revision, even where there is an error, omission or irregularity in the order or judgment or other proceedings, unless it has in fact occasioned a failure of justice. I have no mind to whittle away any past decisions of this Court, which have held that in those particular cases the omission did amount to a failure of justice. But, in the present case, we are satisfied that no failure of justice has been caused, and that the omission to state in an additional line or two the reasons for the finding, is really in the nature of a technical omission, and not one of a grave nature in the present case. In other words, we have no doubt that the accused Nos. 1 and 2 were rightly convicted.

Further, this is an application in revision, and not an appeal, and this also is a discretionary remedy. So really here we have a double discretion to exercise.

Under all the circumstances of the case, therefore, we think that to send this family squabble back again to the Police Court for a re-hearing, or for the matter of that, to quash the conviction altogether, would really not be a course, which would be suitable to adopt in the present case. Under those circumstances, we are not disposed to interfere in revision, and we will direct the papers to be returned.

Fawcett, J.:—I concur. The omission to comply with clause (h) of section 263, Criminal Procedure Code, on the part of the Bench Magistrates, in my opinion, merely amounts to an irregularity which can be cured under section 537, Criminal Procedure Code, inasmuch as the case was a non-appealable one, and there was clear evidence justifying the conviction. It can, therefore, be assumed that the conviction was based on the Magistrates' belief of that evidence; and it is an omission which has not in fact occasioned failure of justice. It is not a case of a direct contravention of some provisions as to the mode of trial like that referred to in *Subrahmanya Ayyar v. King-Emperor* (1). The mere fact that this Court in the case of *Queen-Empress v. Shidgauda* (2), or in other cases, has set aside the conviction for a similar omission, is not,

in my opinion, sufficient ground for holding that in every such case the Court should set aside the conviction. That would be contrary to what has been laid down in very clear terms by Sir Lawrence Jenkins as to the discretionary power which the High Court exercises in revision. In his judgment in *Emperor v. Bankatram Lachiram* (3), he says (p. 566):—

"This discretion ought not to be crystallised, as it would become in course of time, by one Judge attempting to prescribe definite rules with a view to bind other Judges in the exercise of the discretion which the legislature has committed to them."

Here I think our discretion should obviously be exercised in favour of upholding the conviction rather than upsetting it because of a technical error.

Reference answered in negative.

(3) (1904) 28 Bom. 593 = 6 Bom. L.R. 379.

1925 Bombay 139.

MARTEN AND FAWCETT, JJ.

Jagerdeo Ramsumer Teware, In re.

Criminal Application No. 294 of 1924, decided on 14th October, 1924.

Foreigners Act (III of 1864) Ss. 3 and 3-A—Government must issue orders about detention or release or removal without delay—Commissioner of Police cannot do any such thing without such orders.

It is incumbent on Government under S. 3-A, sub-S. (5) of the Foreigners Act, to give their orders for the discharge of the foreigner, or else for his removal under sub-S. (5) without delay. [P. 142, O. 1]

In this class of cases every thing depends upon the order of Government. The Commissioner of Police has no power to deport anybody under this Act. It is not like cases under the Bombay Police Act where a certain discretion—and a wide discretion—is given to the Commissioner of Police to deport certain people who are believed to be the associate of thieves and so on. [P. 142, O. 2.]

Per Fawcett, J.:—The provision of sub-S. (5) about the orders being given without delay is mandatory, and sub-S. (4) must be read as if the words "pending the orders of the local Government" were qualified by the words "such orders being obtained within a reasonable time." [P. 142, O. 2.]

*Kabiruddin and Y. V. Bhandarkar—*for the Applicants.

*Kanga and S. S. Patkar—*for the Crown.

FACTS:—The applicants and his two brothers came from a village in the United Provinces, which was once a part of the

(1) (1901) 25 Mad. 61 = 28 I.A. 257 = 3 Bom. L.R. 540 = 11 M.L.J. 298 = 5 O.W.N. 866 = 10 M.L.J. 147 (P.O.).

(2) (1899) 18 Bom. 97.

British Territory and was subsequently ceded to Rajah of Benares, under a treaty.

The applicant's father resided in Bombay, and carried on business of milkman for nearly forty years. After his death the applicant and his brothers took up the business and carried it on.

Jagerdeo the applicant and his two brothers were arrested under the orders of the Commissioner of Police in Bombay on 17th September, 1924 and detained since then in Jail. On 23rd September, 1924, the case was reported by the Commissioner to the Government of Bombay for orders under section 3-A of the Foreigners Act.

On 23rd September, 1924, the brothers moved the High Court for an order under section 491 of the Crim. Pro. Code, and a rule was granted returnable on 26th September, 1924.

The rule was heard on September 26th, 1924 when proceedings were adjourned to 9th October, 1924.

The following judgment was delivered at the adjourned hearing:—

Marten, J.:—This is an application under section 491 of the Criminal Procedure Code in the nature of habeas corpus. The accused who are three brothers complained originally to us that they were illegally arrested by the police on September 17, 1924; that it was not till several days afterwards they were told what the charge against them was; that they were then informed they were charged with being undesirable foreigners whom it was intended to deport; and that the case was being reported to Government for orders.

Accordingly, on September 23, a rule *nisi* was obtained from this Court, and on the same day it appears that the Police reported the matter to Government.

The rule came before us for hearing on September 26, when it was pointed out by the Court that having regard to the Act under which the authorities were proceeding, *viz.*, section 3 A of the Foreigners Act III of 1864 which has been inserted in that Act by section 3 of Act III of 1915, it was incumbent on the Commissioner of Police to report the case to the local Government at the same time as he issued a warrant for the apprehension of the alleged foreigner. Consequently as the arrest was on the 17th, and the case was not reported to Government till September 23, it could not be said, having regard to that period of

six days, that the Commissioner had complied with sub-section (1) of section 3-A.

But that was recognised at the time as being a technical objection. The parties, if possible, wanted to have the matter determined on the merits, *viz.*, as to whether the accused were foreigners or not, and accordingly on the suggestion, I think, of the Court the accused were *pro forma* released and then re-arrested. There was also to be a new report to Government so as to comply with sub-section (1). Then the prosecution agreed that accused Nos. 2 and 3 should be released on bail by the police under sub-section (4), but accused No. 1 was to remain in custody. Then there was to be a supplemental petition under section 491 of the Criminal Procedure Code to this High Court which was to be brought on for hearing with the original application on October 9.

This intervening period from September 26 to October 9 was to meet the convenience of the parties. The onus of proving that they were not foreigners fell upon the applicants. They wanted to produce further evidence to show that they were not foreigners. On the other hand it was stated by the Advocate General that the Crown wanted to get further information as regards the treaty under which the territory in question was alleged to have been ceded by Government to the Rajah of Benares. Further, there was certain other statements made in the then affidavit of the Deputy Commissioner of Police which really repeated heresay matters as having been reported to him by one of the Police Superintendents in Benares. Accordingly on the facts the Crown also wanted this adjournment. At that time this was considered a reasonable period in which both parties would get their case in order so as to enable it to be disposed of at the next hearing.

Accordingly on October 9, this case came again before the Court. So far as the prosecution was concerned, it was in very much the same state as it had been on the preceding September 26. There was no order from Government as required by the Act, nor was there any evidence about the terms of the cession of the territory to the Rajah of Benares.

I should explain that the importance of that point is this. It is common ground that the accused were all originally British

subjects, that is to say, that the father of the three accused was born in British territory and further that all these three accused were also at the date of their birth born in British territory. But what has happened subsequently is that their native village has, it is said, been ceded by Government to the Rajah of Benares. It was accordingly said that these men have lost their original British nationality and have acquired the status of subjects of a Native State. It was also alleged that being subjects of a Native State, they are now foreigners within the meaning of the Foreigners Acts. That, if necessary, would be a point to be argued, and also it would have to be shown that Government had the power to cede this territory to the Rajah of Benares and also that there was nothing in the treaty which would preserve the original national rights as British subjects of any persons in the position of the accused.

On the other hand the accused have alleged that their father was carrying on business in Bombay for some forty years in connection with buffaloes and the sale of milk, and that they themselves have been in Bombay for a large number of years. The first petitioner claims to have come to Bombay in 1909; the second petitioner, in 1909 and again in 1914; and the third petitioner, in 1916. They say they have a large business in Bombay; that they own a large number of buffaloes; and that their assets are worth half a lac of rupees and over; and that accordingly it is a great hardship on them that they should suddenly be arrested and their animals be left to the tender mercy of others.

That then is how the facts stood on October 9, when we granted a further adjournment till to-day. We also directed that any further affidavit which the prosecution wished to put in should be put in by October 13 peremptorily. Clear intimation was also given to the Advocate-General by the Bench that unless the requisite order from Government for deportation, or alternatively for discharge, was not obtained by to-day, then the natural and probable consequence would be that we should direct the accused to be discharged.

An affidavit has since been put in by the prosecution but in effect it carries the case no further. Substantially nothing further

has been done by the prosecution. We are still without the treaty, but what is more important we are still without any order from Government. The order that I have made such frequent reference to is that contained in sub-section (1), viz., "Whenever in a Presidency town the Commissioner of Police or elsewhere the Magistrate of the District, considers that the Local Government should be moved to issue an order under section 3 in respect of any foreigner who is within the limits of such Presidency town or of the jurisdiction of such Magistrate, he may report the case to the Local Government and at the same time issue a warrant for the apprehension of such foreigner." Then sub-section (5) provides that:—

"Any officer who has, in accordance with the provisions of sub-S. (4), ordered a foreigner to be detained or released on his executing a bond shall forthwith report the fact to the Local Government. On the receipt of a report under this sub-section the Local Government shall without delay either direct that the foreigner be discharged or make an order for the removal of such foreigner in accordance with the provisions of S. 3".

Then turning to the main Act, section 3 provides that:—

"The Governor-General of India in Council may, by writing, order any foreigner to remove himself from British India, or to remove himself therefrom by a particular route to be specified in the order; and any Local Government may, by writing, make the like order with reference to any foreigner within the jurisdiction of such Government."

It will be seen, therefore, that in this class of case everything depends upon the order of Government. The Commissioner of Police has no power to deport anybody under this Act. It is not like cases under the Bombay Police Act where a certain discretion—and a wide discretion—is given to the Commissioner of Police to deport certain people who are believed to be the associates of thieves and so on.

What power then is there to retain accused No. 1 any longer in custody, and what power is there to impose the conditions of bail on accused Nos. 2 and 3 as the price of their retaining an ostensible liberty? In my opinion the case to-day has reached a point where, without an order from Government of deportation under section 3 of the Act, any such continued detention or any such continued bail is an illegal or an improper detention within the meaning of section 491 (1) (b) of the Criminal Procedure Code, or alternatively these particular accused are not being dealt

with according to law within the meaning of section 491 (1) (a).

In my judgment it is incumbent on Government under section 3-A, sub-section (5) of the Foreigners Act, to give their orders for the discharge of the foreigner, or else for his removal under sub section (5) without delay. I quite recognise that a reasonable time must be allowed in such cases, and that naturally, owing to the conditions under which Government Departments must work, one cannot expect that matters of this sort can be dealt with the same speed as if it was merely a case of making an application direct at once to some single individual who had complete power to dispose of the matter there and then.

But I do feel this strongly. We are dealing here with the liberty of the subject. Shortly stated, this man, accused No. 1, has been under arrest and in the custody of the Police from September 16 up to to-day. That is nearly a month. The original action taken by the Commissioner of Police in not reporting the matter to Government forthwith after the arrest was in my opinion illegal. That matter was put straight on September 23. But even then a whole fortnight has elapsed and even still, as I have already stated, there is no order from Government.

As far as I can see here, a wrong procedure has been adopted. The matter should have been investigated first, and the arrest made afterwards. Then there would have been no difficulty in obtaining the orders of Government soon after the arrest. But it does not rest with the Commissioner to deport alleged foreigners under the Foreigners Acts. That is a matter for the Government and solely for the Government. But there the Act, as I have explained, puts a restriction on the executive powers of Government of deportation, viz., that they must be exercised without delay on the receipt of the report from the Commissioner of Police.

In my opinion the time that has elapsed here does constitute such delay. Further, in my opinion, it would be unfair on the petitioners to postpone the present hearing of this rule *nisi* any longer. This is the third time on which it has come up for hearing. To-day there is no order of Government as to these men's deportation. Accordingly in my opinion this rule *nisi* ought to be made absolute and all three

men discharged from custody or detention.

Under these circumstances it is unnecessary for this Court to say anything on the point whether these men are foreigners within the meaning of the Act. There being, in my judgment, a clear ground on which this rule should be made absolute I do not see the necessity or the desirability of embarking on a discussion of a point which in my judgment is not necessary for our decision on the main point of the case, which after all is whether these men should be set at liberty or whether they should any longer be detained in the custody of the Police.

Fawcett, J.:—I agree in making the rule absolute on the ground that these three persons are being improperly detained. Pending the proceedings two of them have been released on bail, but in effect they are in detention under special arrangements for their temporary liberty.

The authority vested in the Commissioner of Police to arrest a person, who he thinks is a foreigner, under sub-section (1) of section 3-A is one that he can, in my opinion, exercise by himself, and I do not think that his power is restricted to a case where he can simultaneously obtain orders from Government for the removal of such foreigner. But undoubtedly sub-section (5) requires that after the Commissioner of Police has reported that he has ordered the foreigner to be detained or released on bail, the Local Government is to take action without delay. Accordingly when sub-section (4) of the same section 3-A authorises the Commissioner of Police to direct a foreigner to be detained in custody pending the orders of the Local Government, this must obviously be read with the direction in sub-section (5) that I have already mentioned, requiring these orders to be given without delay. That is to say, it cannot be contended that the Commissioner of Police could direct a foreigner to be detained in custody for an unreasonable length of time pending the orders of the Local Government, e.g., for six months.

In my opinion the provision of sub-section (5) about the orders being given without delay is mandatory, and sub-section (4) must be read as if the words "pending the orders of the Local Government" were qualified by the words "such orders being obtained within a reasonable time," for "without delay" means this.

I agree with my learned brother that the fortnight or more that has expired since the proceedings when these persons were re-arrested on September 23 has given ample time for obtaining the orders of the Local Government, and that the delay renders the further detention of these persons improper. I do not mean to lay down any general rule that an order must always be obtained within a fortnight after the report of the Commissioner of Police. But in view of the warning we gave and the other circumstances, especially the legitimate doubt that arises whether these people are really foreigners, it is a case where this Court is justified in exercising the powers given it by section 491 of the Criminal Procedure Code.

[As regards the question of costs, the opinion of the Lordships was as follows.]

Marten, J.:—As regards the question of costs, rule 5 of the Appellate Side Rules, 1920, provides that "In disposing of any such rule, the Court may, in its discretion, make an order for the payment by one side or the other of the costs of the rule." We think in this case that the costs of the rule should be paid by the respondent. As regards the mode in which these costs are to be ascertained the applicant appears here by counsel Mr. Kazi Kabiruddin instructed by a High Court Pleader Mr. Bhandarkar. It was suggested to us that we should make an order that the costs be taxed as on the Original Side. I am aware that this is a form of order which is sometimes made in an appropriate case in certain branches of this Court. But speaking generally costs on the Original Side are matters between solicitor and client and are not between pleader and client. Consequently I do not think it would be proper in this present case to direct the costs to be taxed as on the Original Side.

On the other hand there is a suggestion by the Government Pleader that the petitioners should be content with Rs. 30 for the whole of these hearings, and that they are not to be allowed even the costs of their counsel. This contention appears to me to be wrong. The Crown appeared here by the Advocate-General and the Government Pleader, and, in my opinion, having regard to the importance and to the difficulty of the case it was quite right and proper that the petitioners should wish to

have counsel to oppose the Advocate-General.

Under these circumstances, we think the proper order will be to direct the Registrar to assess the petitioners' costs of this rule, and that in doing so he do allow reasonable costs of counsel and also reasonable costs of the affidavits which have been filed in support of the applications. The costs as so assessed to be paid by the respondent.

Fawcett, J.:—I concur.

Rule made absolute.

1925 Bombay 143.

MARTEN AND FAWCETT, JJ.

Narayan Anant Desai—Accused-Applicant

v.

Emperor—Opposite Party.

Crim. App. for Rev. No. 217 of 1924, decided on 18th September, 1924, against conviction and sentence passed by Ag. Fourth Presy. Magistrate, Bombay.

(a) *Factories Act (XII of 1911), S. 18 (2)*—*Procedure as to service of notice or order should be strictly followed—Mere knowledge is not enough—Visit note by Inspector is not an order.*

The numerous provisions in the Procedure Code for service of notices or orders are intended to make it certain that a particular process or an order of the Court is brought to the specific notice of the individual affected. A mere knowledge that proceedings may be instituted or something of that sort is not sufficient to take the place of the imperative directions in the Code as to service on the actual individual. The words in S. 18 (2) "serve on the manager an order in writing" mean that such an order as is referred to in Form O should be served definitely on the manager of the factory: and that it should specify exactly what measures the manager is to take in order to remove the danger. But a mere note of a visit is not such an order as is contemplated therein. [P. 145, O. 1.]

(b) *Factories Act (XII of 1911)*—*Position both of employee and employers should be looked to.*

Factory Acts should be properly enforced for the protection of workmen but on the other hand one must also bear in mind that the employer's position has to be considered too. It may be that without any negligence on their part defects will exist in their factories, but if they are to be proceeded against in a Criminal Court for alleged negligence, then it would seem only fair that the matter should be clearly brought home to them. [P. 145, O. 2 and P. 146, O. 1.]

A.G. Desai—for the Accused.

S. S. Patkar—for the Crown.

Marten, J.:—In this case it is now common ground that the accused is charged and convicted solely under sections 41 (g)

and 18 (2) of the Indian Factories Act, 1911. Section 41 (g) provides for the case where any order of an Inspector (*inter alia*) under section 18 is not complied with. Then section 18 (2) runs:

"If in any factory there is any other part of the machinery or mill gearing which may in the opinion of the Inspector be dangerous if left unfenced, the Inspector may serve on the manager of the factory an order in writing, specifying the measures which he considers necessary for fencing such part in order to remove the danger, and requiring him to carry them out before a specified date."

Why I lay stress on the particular sections under which the accused is now charged and convicted is, that the original application of February 27, 1924, by the Inspector of Factories, asked for a summons under section 41 (f) for breach of section 18 (3) of the Act. Then the summons that was actually served on the respondent, and which we have seen, is under section 41 (f) for breach of section 18 (2). The summons was clearly wrong because section 41 (f) does not apply to sub-section (2) of section 18 at all.

Then as regards the original application made by the Inspector of Factories, section 18 (3) applies to a different matter altogether, *viz.*, that "all fencing must be constantly maintained." But the allegation here is not that the fencing was not maintained, but that it was not put up at all. So that also was a mistake. Similarly to avoid any misunderstanding, I wish to make it perfectly clear that the charge is not under section 18 (1) (c) which provides that "Every part of the machinery and electrical fittings including live wires and switches which the Local Government may by rule require to be kept fenced shall be securely fenced." It is admitted by the Government Pleader that that sub-section does not apply here.

That being so, we are left with section 18 (2), and the short point for our decision is this: Did the Inspector serve on the manager of the factory an order in writing specifying the measures for protection which the manager of the factory was to carry out? Now the actual document relied on by the prosecution as being such an order is a note made by the Inspector of Factories, Mr. Johnstone, on July 30, 1923, in what is called the "Inspection Book" which has to be kept under the rules. It runs: "Visited. The manager has agreed to visit the Wolverhampton Works and to see the press guards in

operation. Similar guards or guards automatic in operation which will prevent an accident similar to the one to Ram Singh to be fitted within five months."

I should explain that the Wolverhampton Works here have nothing whatever to do with any works at Wolverhampton in England, but are some local works of that name in Bombay. Similarly the accident to Ram Singh was an accident in this factory of the accused which had happened prior to the visit of the Inspector.

I should also have explained at the outset that this factory is a metal stamping press, and though there is no express evidence on the point, the Government Pleader has explained to us that the machinery in question consists of a vertical rod going up and down into a cup which is fed by the workman with the object of stamping the article as the rod goes up and down. Consequently if the workman makes a mistake and does not withdraw his hand in time, it may be crushed. The automatic guards referred to by the Inspector were intended to be of such a nature that they would prevent such an accident happening to the workman. Nothing turns on that, and I only mention it to show what were the surrounding circumstances.

Now under the Act there are some other material sections. Section 37 provides for rules being made by Government. Then if one turns to the rules framed under the Act, *viz.*, the Factories Amended Rules, Bombay, 1923, it will be found that under rule 4 the manager has to maintain an inspection book. Under rule 5 the Inspector at each inspection has to satisfy himself of certain things. Then after the first sentence in sub-rule (c) there is the following provision, *viz.* "A note of all defects or illegalities discovered together with orders for their remedy or removal passed by him under the Act or these Rules shall then be prepared in triplicate. One copy shall be entered in the inspection book. In confirmation of such orders the Inspector shall subsequently send to the occupier or manager a note of all defects and illegalities discovered in Form O and a copy of the said list shall be sent, at the same time, to the District Magistrate concerned, and to the authority to whom the Inspector is subordinate."

Then if one turns to Form O one finds that it is a formal notice which runs as

follows: "Upon a recent inspection of your factory it was found, to the extent indicated below, that certain provisions of the above Act and Rules were not being carried out. I, therefore, request that the necessary steps be taken at once to comply with the law."

Then there is one other section which I should refer to, viz., section 50, as to the right of appeal. It enacts that "any person on whom an order under...section 18 has been served may, within fourteen days from the date of service of the order, appeal against such order to the Local Government or to such authority as it may appoint in this behalf, who may confirm, modify or reverse any such order."

Then sub-section (3) provides that in the case of such an appeal, the appellate authority may, and if so requested by the appellant shall, hear the appeal with the aid of two assessors. So that section as to appeals lays stress on the date of the service of the order.

Now the service of an order or notice is a well-understood expression in our law Courts, and we have numerous provisions in the Procedure Code for service of notices or orders. They are intended to make it certain that a particular process or an order of the Court is brought to the specific notice of the individual affected. Accordingly a mere knowledge that proceedings may be instituted or something of that sort is not sufficient to take the place of the imperative directions in our Code as to service on the actual individual. To take one instance. One knows that in civil proceedings for contempt of Court one of the essential points is that the initial process for committal or attachment should be served personally on the respondents. The same applies with equal force to anything in the nature of criminal or penal proceedings.

Here in my opinion the fair meaning of the words in section 18 (2) "serve on the manager an order in writing" is that such an order as is referred to in Form O should be served definitely on the manager of the factory: and that it should specify exactly what measures the manager is to take in order to remove the danger. Then if the manager disobeys that order, he does so at his peril. He also knows that he has a certain limited time within which to appeal if he objects

to the order. But a mere note of a visit like the one here which begins by saying that the manager has agreed to visit certain works, can hardly be said to be an order, at any rate not the first part of it. And one can well understand that if every thing that the Inspector chooses to write in an inspection book is necessarily to be taken as an order against which the factory owner must appeal within fourteen days to the Local Government, then a considerable amount of trouble and confusion may be caused. I think section 18 (2) contemplates that the Inspector is to make up his mind definitely what is the order which he requires to be carried out under this Act, and for breach of which he will prosecute the factory owner or manager under the Act, and that equally definite notice is to be given to the latter.

In my opinion there was no service of any order in writing by the Inspector in the present case within the meaning of section 18 (2). Merely writing that note in that book was not contemplated by the Act as sufficient. And I think the mere fact that the manager was aware of what the Inspector wanted him to do is not, in my opinion, a sufficient compliance with the specific requirements of this penal Act. It is not suggested that there was any service by registered post under rule 69.

I may add that no explanation has been given to us why originally the Inspector charged the accused under a different section, and not under section 18 (2) at all. It is said this was a mistake, but it was a curious mistake for the authorities to make in launching criminal proceedings or semi-criminal proceedings against the accused, if they really thought that any such orders in writing had been made and served on the manager.

Accordingly in my opinion the decision of the learned Magistrate was wrong, and I would accordingly set aside the conviction and sentence and direct the fine if paid to be refunded.

I wish to add this. I am fully alive to the great importance of Factory Acts being properly enforced for the protection of workmen, and I have no doubt that in India it is particularly necessary that their beneficial provisions should be carried out.

On the other hand one must also bear in mind that the employers' position has to be considered too. It may be that without any negligence on their part

defects will exist in their factories, but if they are to be proceeded against in a Criminal Court for alleged negligence, then it would seem only fair that the matter should be clearly brought home to them. That I have no doubt is the reason why the legislature has distinctly specified what the Inspector has to do under section 18 (2) and also under rule 5 (c) and Form O. Whether the particular accused in the present case was negligent or not does not concern this question of general principle on the construction of the Act.

I am glad to add that the accused's counsel has been able to tell us that our decision in no way affects the order of compensation which was passed by the learned Magistrate, *viz.*, Rs. 200. His client, he says, will pay double that amount to the injured workman. His reason for appealing to us has not been to evade payment of any fair compensation, but to avoid a conviction under the Indian Factories Act.

Fawcett, J. :—It may be noticed that in every case of an order of an Inspector that is covered by clause (g) of section 41, the section authorizing the order requires the Inspector to serve on the manager of the factory a notice of his requisitions. The same condition is also laid down in section 8-A, which is not a section specified in clause (g) of section 41. This clause (g), as printed in the compilation handed to us, mentions section 19-B, but that is a mistake for section 19-A, which has been corrected by Act XI of 1923.

The legislature obviously lays stress on this service of a notice, and there cannot, in my opinion, be a punishable breach of an order under any of these particular sections unless the condition precedent mentioned in those sections is complied with, that is to say, that the requisite notice has been served on the manager of the factory. That is in accordance with the ordinary rule of construing penal statutes.

In regard to what is ordinarily contemplated by the service of a notice, I may refer to the provisions of the Indian Income Tax Act, 1886. That is an Act which allowed the Collector to serve notices on certain persons. For instance, sections 12 and 13 say that the Collector shall cause a notice to be served on either the company or the person concerned, and provision is made that in case of such person failing to

comply with the provisions of those sections, he can be punished under section 34. But the Act contains a section, *viz.*, section 46, as to service of notices, and the main provision is section 46 (1): "A notice under this Act may be served on the person therein named either by a prepaid letter addressed to the person and registered under Part III of the Indian Post Office Act, 1866, or by the delivery or tender to him of a copy of the notice." Then follow certain provisions in regard to presumption of posting, etc., which I need not specify.

Then in the General Clauses, Act 1897, we have section 27 which is a section dealing with the manner of service by post. It provides that if you properly address, prepay and post a notice by registered post, then the presumption is that service has been effected. Consequently in later Acts, for instance, the Indian Income Tax Act, VII of 1918, the provision in section 46 as to service of notices merely required that "a notice or requisition under this Act may be served on the person therein named either by post or by the delivery or tender to him of a copy of the notice or requisition in the manner provided by the Code of Civil Procedure, 1908, for the service of summons."

A similar provision will be found in section 63 of the last Income Tax Act of 1922. So that it is obvious that there is a recognised degree of formality in regard to service of notices, and this is clearly provided for by the rules, especially rule 5 (c), rule 69 and Form O of the forms attached to the rules. The Act itself also in sections 41 and 53 shows the necessity for care as to proper service of a notice.

I think, therefore, that the conviction of the petitioner under clause (b) of section 41 of the Indian Factories Act, 1911, cannot be sustained, and I concur in the order proposed by my learned brother.

Rule made absolute.

1925 Bombay 147.

MARTEN AND FAWCETT, JJ.

Mahomed Roshan—Accused-Appellant.

v.

Emperor—Opposite Party.

Criminal Appeal No. 373 of 1924, decided on 24th September, 1924, from conviction and sentence passed by Addl. Presidency Magistrate, Bombay.

Crim. Pro. Code, S. 362 (1) and (2)—Strict compliance is necessary even where the accused is to be sent to Dharwar Juvenile Jail.

A Magistrate must comply with the provisions of S. 362 (1) and (2) where, he deals with a case under S. 457 read with S. 511, I.P.C., and passes a sentence of one year's rigorous imprisonment though the sentence is to be served in the Dharwar Juvenile Jail. [P. 147, C. 2]

Accused was not represented.

S. S. Patkar—for the Crown.

Fawcett, J.—This is an appeal against a conviction under section 457, read with section 511, Indian Penal Code, by the Additional Presidency Magistrate, Mr. Thacker, who sentenced the appellant to one year's imprisonment. In the appeal it is alleged that the appellant was decoyed by a stranger to the place where he was arrested and wrongly accused of house-breaking and theft.

There is no record of the statements of the witnesses at the trial. Their names only are given, with an indication that they gave evidence and were cross-examined. The Magistrate has thus failed to comply with the provisions of sub-sections (1) and (2) of section 362, read with section 411, Criminal Procedure Code, for the sentence inflicted upon the appellant exceeded six months.

The learned Magistrate was asked why evidence had not been properly recorded as required by section 362, Criminal Procedure Code, and his explanation is that he was misled by the analogy of sending juvenile offenders to Reformatory Institutions for three years or more into thinking that the sending of a boy to the Dharwar Juvenile Jail is not strictly speaking a sentence of imprisonment but of detention in a Reformatory. He refers to the Government Rules which require a minimum sentence of twelve months' rigorous imprisonment in such a case and accordingly he had to impose one year's imprisonment, but treated it as merely nominal. This

explanation is not quite satisfactory because obviously the very description of the Dharwar Juvenile Jail as a *jail*, and the fact that a sentence of imprisonment has to be passed, clearly distinguishes the case from one in which a sentence of detention in a Reformatory is passed under the Reformatory Schools Act. It may also be pointed out to the learned Magistrate that even in cases falling under sub-section (4) of section 362, the discretion which is allowed to a Presidency Magistrate not to record any evidence should be exercised reasonably, as has been pointed out by this Court in *Emperor v. Harischandra Talcherkar* (1).

I make this remark, because in several cases, I have noticed that this Presidency Magistrate does not follow the example of other Presidency Magistrates, who give at least a general indication of the nature of the evidence of the witnesses regarding any serious crime not falling under the description of an ordinary "morning case."

In the present instance, in our opinion, there has been a serious irregularity in the Magistrate failing to comply with the provisions of sub-section (1) of section 362, Criminal Procedure Code. This irregularity obviously prejudices the accused, as we cannot consider the appeal on its merits. We have no knowledge of the exact allegations that were made in evidence, nor of the exact reasons on which the Magistrate based his conviction. In our opinion this occasions a failure of justice, which prevents the irregularity being waived under section 537, Criminal Procedure Code.

The learned Government Pleader, who has appeared at the direction of the Court, does not dispute that under the circumstances of the case an order for a re-trial is the proper one to be made.

We, therefore, quash the conviction and sentence recorded against the accused, and direct that he should be re-tried before a Presidency Magistrate other than the one who has already expressed an opinion in the case, to be nominated by the Chief Presidency Magistrate, and we hope that in future the learned Magistrate will comply more strictly with the provisions of section 362, Criminal Procedure Code.

Marten, J.—I agree. I would only add that the materials before us on the present record, including the learned Magistrate's

(1) (1907) 10 Bom. L.R. 201=7 Cr. L.J. 194.

judgment, are so scanty that it is impossible to check any detail whatever in connection with the offence, or even to know what it was exactly that the accused did which led to this charge against him of an attempt to commit house-breaking by night.

Re-trial ordered.

1925 Bombay 148.

SHAH, AG. C.J. AND FAWCETT, J.

Girjabai Shivāeoraō Vinchurkar —
Defendant-Appellant

v.

Narayan Rao Ganpatrao Vinchurkar —
Plaintiff-Respondent.

F. A. No. 37 of 1923, decided on 8th August, 1924, from the decision of the First Class Sub-Judge, Nasik, in Suit No. 218 of 1921.

Pensions Act, S. 4—Covers cash allowance in commutation of kulkarni services.

Suit by one co-sharer for his share of cash allowance in commutation of kulkarni services received by another co-sharer cannot be maintained without certificate from Collector. [P. 149, C. 1.]

G. N. Thakor and V. D. Limaye—for the Appellant.

D. R. Patvardhan—for the Respondent.

FACTS :—A partition was made between three brothers in 1869. In that partition certain properties consisting of inami and mirasi land and patelki and vatani lands and cash allowances were kept joint and left under the management of the eldest brother. He was to collect the income of these and to divide it in equal shares between the brothers. The brothers confirmed this arrangement in 1897 when they again agreed that the property kept joint in previous partition should be enjoyed as till then until actual partition was made. The death of the eldest brother took place in 1889 and the death of his adopted son who succeeded him took place in November, 1918. Upon this his widow who is the defendant in the present case succeeded to the management of the property. In the year 1914 one of the three brothers who were parties to the partition arrangements filed a suit to recover his share in the income of the properties but the suit was compromised. In July 1921 his son the present plaintiff filed the present suit for his share in the

income of the individual properties which included amounts of Kulkarni commutation of certain villages and rusum received from the Taluka treasury. The defence to the suit was that so far as the cash allowances were concerned the suit was not maintainable under section 4 of the Pensions Act and that the whole claim was barred by limitation.

Shah, A.C.J. :—[His Lordship after stating facts and discussing evidence, referred to the contention that a certificate under section 4 of the Pensions Act was necessary for the maintenance of the suit and observed :—]

There are no doubt conflicting considerations, one favourable to the contention and the other against it. In the present case, it is urged on behalf of the respondent that really in virtue of the two arrangements, one in 1869 and the other in 1897, the defendant must be taken to be in the position of a person who, as soon as the money was received, held the money for the other sharers so far as those sharers were concerned and that the money then ceased to be a grant from the Government. The decisions bearing on this point which have been referred to are *Damodar v. Satyabhamabai* (1) on the one hand, and *Raghavendra Ayyaji v. Gururao Raghavendra* (2) on the other. Looking at the point for the moment, apart from the decisions, it is difficult to say that the suit, so far as these four items are concerned, does not relate to the grant of money by the British Government within the meaning of section 4. It is true that there was an arrangement between the parties, whereby the defendant's husband was to receive the money and then distribute it among the sharers according to their respective shares. But that by itself does not afford a sufficient basis for holding that the suit does not relate to those four items. The judgment of Chandavarkar, J., in *Damodar v. Satyabhamabai* (1) in which the earlier decisions on this point have been referred to, is very clear on this point, and, though there are observations to the contrary in *Raghavendra v. Gururao Raghavendra* (2) I think that the contention of the defendant on this point must be allowed. It is true that the section must be strictly construed; but we cannot ignore

(1) (1907) 31 Bom. 512 = 9 Bom. L.R. 889.

(2) (1913) 37 Bom. 442 = 19 I.C. 882 = 15 Bom. L.R. 362.

the plain meaning of the words used. This conclusion necessitates giving time to the plaintiff to produce the necessary certificate. But it would not be necessary in any way under the circumstances of this case to delay the further proceedings in this suit. There is at present only a preliminary decree for taking accounts, and it can be provided in the decree of this Court that after the accounts are taken, before any decree in respect of these four items is passed, the plaintiff must produce the necessary certificate under the Pensions Act, and, if he fails to do so, he cannot get any relief in respect of these items.

The next point relates to limitation. As regards that question the learned Judge has overruled that plea on the ground that the suit would be governed either by Art. 120, in which case the period of six years would apply or article 89 in which case no doubt the period would be three years; but it would run from the termination of the agency or from the date of the refusal to render accounts. In the present case it is not suggested that there was any demand and refusal to render accounts, and preferably it seems to me that article 89 would apply having regard to the terms of the agreement between the parties. It may be said, however, that when Shivdeorao died in 1918, the arrangement of 1897 came to an end. Without expressing any opinion as to whether or not in virtue of that very arrangement Shivdeorao's widow was in the position of an agent within the meaning of article 89, as the suit is brought within three years from Shivdeorao's death, it is clearly not barred.

It has been urged further in connection with this point, that as after 1890 there has been no rendering of accounts and no payments made by the defendant in respect of those items, the plaintiff's right to recover those items is extinguished. In the first place, though this point is mentioned in the plaint, no issue as to exclusion to the knowledge of the co-sharer for over twelve years from enjoyment of certain immoveable property was raised. It is assumed by the defendant for the purposes of this argument that these Babs should be treated as immoveable property, and it is urged that the right of the plaintiff is extinguished. This point would require investigation on different lines altogether, and without allowing the plaintiff a further opportunity to adduce evidence on the point, it could

not possibly be decided as desired by the defendant. There is no reason why such further opportunity should be allowed, and having regard to the facts in the case, it seems to me that the point is without any substance. I have already referred to the various suits, in which the right was asserted by one branch or the other and either allowed by the Court or compromised by the parties. Under the circumstances it would be difficult to hold that there has been exclusion. The letter written by the defendants' Kulmuktyar on July 26, 1920 to the present plaintiff is sufficient to negative the suggestion of such exclusion.

The next question relates to the merits of the plaintiff's claim. As regards item 12 the lower Court has disallowed the plaintiff's claim as it was admitted by the plaintiff's father in an earlier proceeding that he had given up claim to that item. In spite of the contention of the respondent against this conclusion, it is clear it must be accepted. The admission of the plaintiff's father is unequivocal, and there is no reason why the decree on this point should be altered. Apart from that the learned Judge has considered in his judgment the different items in respect of which various arguments were urged, and has come to the conclusion on a consideration of the two documents, Exhibits 48 and 92, that all these Babs really belonged to the family, and that all the members of the family were interested therein. The wording of the letter written by the defendant's Kulmukhtyar in July, 1920, affords corroboration of the plaintiff's claim: and indeed in the evidence of the defendant's Kulmukhtyar, it has been practically admitted that all the suit Babs are the private properties of the Vinchurkar family, that they are their ancestral properties, and that they belonged to three brothers Ragunatharao, Krishnarao and Madhavrao. It is urged on behalf of the defendant, as against the statement of his own Kulmukhtyar, that that was a mistaken statement as the witness was speaking without reference to the account books. That does not appear to me to afford sufficient ground for not accepting the statement of the witness. It is hardly necessary to deal with all these Babs separately. It seems to me that in spite of the contentions urged before us on behalf of the defendant, the conclusion of the trial Court on the point must be accepted. I only desire to add with reference to this point that

these Babs are of such a nature that it is possible that some of them may be found to be non-existent on taking accounts, or they may have existed only for a time during the period in respect of which the accounts are to be taken. That however will be taken into consideration when the accounts are taken. All that we decide now is that any items in respect of these Babs, if received by the defendant, should be accounted for.

In the result, therefore, I would confirm the decree of the trial Court, subject to the reservation that on taking accounts no decree in respect of anything payable in respect of items 14, 19, 26 and 33 should be passed in favour of the plaintiff, unless he produces the necessary certificate under the Pensions Act before that time.

The appellant to pay the costs of the respondent in this appeal. The cross-objections are dismissed with costs.

Fawcett, J.—I concur in the judgments just delivered. With regard to the objection raised under the Pensions Act, the terms of section 4 of that Act are very wide, and in view of the ruling of this Court in *Damodar v. Satyabhama Bai* (1) and similar rulings such as *Babaji Hari v. Rajaram Ballal* (3). I do not think we can possibly say that this suit, so far as it relates to the four items 14, 19, 26 and 33, does not fall under section 4.

In regard to the points of limitation which have been urged, the first question to consider is the nature of the relations between the plaintiff and the defendant. So far as the defendant, as the eldest representative of the family, collects the whole revenue, of which the three brothers were tenants-in-common there clearly, in my opinion, is a relationship of principal and agent, the defendant being the agent of the plaintiff in respect of the recovery of the particular portion of that revenue, in regard to which he has a one-third share, and if that is the case, then article 89 of the Indian Limitation Act, and not article 62, is the proper article to apply. In support of that I may refer to the ruling of this Court in *Gapu v. Zipru* (4). But supposing that the relationship of principal and agent was broken by the arrangement of 1897, under which the plaintiff's father and the defendant's husband Shivdevrao

agreed that the plaintiff might collect his share of certain items of revenue direct, then, if in contravention of that arrangement the defendant has collected the revenue that the plaintiff might have collected on his own account, the relationship becomes one of the defendant being a constructive trustee under section 94 of the Indian Trusts Act. The defendant in that case would be practically in the position of a trustee *de son tort* by intermeddling and collecting this revenue; and her obligation to account still remains under section 94 of the Indian Trusts Act. It is not open to her to say that she is a mere trespasser, and therefore not liable to account. In support of that I may refer to *Dhanpat Singh Khettry v. Mohesh Nath Tewari* (5). If in regard to certain items of the revenue the relationship is that of a trustee and *cestui que trust*, then the right article to apply would, it seems to me be article 120 and not article 62. Here, again, I may refer to ruling in cases similar to this, *Muhammad Habibullah Khan v. Safdar Husain Khan* (6) and *Subba Rao v. Rama Rao* (7). But in my opinion it does not necessarily follow that the relationship of principal and agent, that was originally between the parties was broken by the arrangement of 1897. There is a presumption of the continuance of the former relationship of principal and agent, and before we can conclude that that relationship has been broken, some more definite acts than the mere passing of this agreement of 1897 are necessary. The actual facts are consistent with the continuation of the previous relationship by the mutual consent, no real effect having been given to the agreement of 1897, so far as it intended to alter the previous arrangement. Accordingly I hold that article 89 of the Indian Limitation Act is the proper article to apply to this suit, and I understand it has been so applied by this Court in previous litigation between Shivdevrao and the representatives of the second branch of the family. That being so, the claim is not barred, and even if article 120 is applied it would only knock off about one year.

I do not think there is any substance in Mr. Thakor's main contention that there

(3) (1875) 1 Bom. 75.

(4) (1921) 45 Bom. 313=59 I.C. 357=22 Bom. L.R. 1289.

(5) (1920) 24 C. W. N. 752=57 I. C. 805.

(6) (1884) 7 All. 25=(1884) A.W.N. 219.

(7) (1916) 40 Mad. 291=30 M.L.J. 341=19 M.L. T. 134=32 I.C. 899=3 L.W. 192=(1916) 1 M.W.N. 188.

had been exclusion of the plaintiff, which would bar his claim altogether. It seems quite clear that there have been prior claims of this nature, and the defendant's Kulmukhtyar in his evidence admitted that some of these claims have been successful. For instance, with regard to the suit of 1906, he says that a decree was passed in his favour by arbitrators; in regard to this suit of 1914 there was a compromise, no doubt for a small sum, but still it goes against the theory of exclusion, and, as I have already said, the defendant cannot take advantage of the arrangement of 1897 and say she is not liable to account, if as a matter of fact she acts against that arrangement and herself collects the whole revenue.

Decree confirmed.

1925 Bombay 151 (1).

MARTEN AND FAWCETT, JJ.

Gafur Daud Saheb, In re.

Criminal Appeal No. 393 of 1924, decided on 10th October, 1924, against an order of the Sessions Judge, Ratnagiri.

Crim. Pro. Code (amended Act XVIII of 1923), S. 195—Sanction granted after new Code came into operation is illegal.

A sanction to prosecute for perjury granted after 1st September, 1923, i.e., when the new Code (Act XVIII of 1923) came into force is illegal. (1924 Cal. 826, *Foll.*) [P. 151, O. 2.]

G. B. Chitale—for the Accused.

Marten, J.:—In this appeal the learned Sessions Judge appears to have made a slip in granting sanction to prosecute the appellants for perjury under the old procedure and in overlooking the circumstance that under section 476 of the Criminal Procedure Code a different procedure ought now to be followed. The amended Criminal Procedure Code came into force on September 1, 1923. The above sanction was given long afterwards, viz., on June 30th, 1924. It would further appear that even the first application for sanction was not made until September 10th, 1923. So the provisions of section 6 of the General Clauses Act, to which my learned brother has drawn the attention of counsel, could in no way apply.

We have been referred by counsel to *Baldeo Misser v. Deputy Inspector-General of Police, C.I.D., Bengal* (1) where precisely

(1) 1924 Cal. 826—51 Cal. 652.

the same point arose, and where it was held that, having regard to the amending Act, the sanction purported to be there given was illegal and that no Court could take any cognizance of it. It does not appear that there the above section of the General Clauses Act was referred to, and it appears to have been conceded that the Magistrate had no jurisdiction to make the order which he did in that particular case.

The order we make is that we quash the direction granting sanction to prosecute the appellants, and direct the withdrawal of the complaint, which we understand has been presented in accordance with the sanction which the learned Sessions Judge purported to give. Speaking for myself, I prefer to adopt the course which Mr. Justice Greaves took in *Baldeo Misser's* case and to say nothing as to any alternative course which may be still open to the learned Sessions Judge with reference to this alleged perjury.

Fawcett, J.:—I concur.

Appeal allowed.

1925 Bombay 151 (2).

SHAH, AG. C.J. AND KINCAID, J.

Narsingji Mehramansanji—Appellant.

V.

Bai Achrat—Respondent.

Appeal from Order No. 57 of 1923, decided on 21st August, 1924, against the Order of the District Judge, Ahmedabad, in Appeal No. 281 of 1921.

Bombay Land Revenue Code, S. 121—Civil suit lies from decision of Survey Officer on a title dispute.

Decision of a Settlement Officer regarding the title to certain area is open to challenge in a subsequent civil suit where the dispute did not involve any question as to boundaries. [P. 152, C. 2.]

H. V. Divatia—for the Appellant.

*Dhirajlal Thakore and M.K. Thakore—*for the Respondents.

Shah, A.C.J.:—This has been rather an unfortunate litigation as it commenced in 1914, and in 1924 we are hearing this appeal from an order remanding the suit for retrial on the merits.

The plaintiffs claimed to be the owners of certain lands described in the schedule to the plaint as belonging to the estate of Kankapura while the defendants who represent the estate of Dehvan contended that the suit was not maintainable as the Assistant Survey Settlement Officer had decided the questions, and that the lands

belonged to the Dahvan estate. On these pleadings two issues were framed in the trial Court:—

(1) Is the suit for alteration of the decision of the Assistant Survey Settlement Officer as regards Dahvan and Kankapura unmaintainable?

The finding was that it was not maintainable.

(4) Do the lands described in schedule A annexed to the plaint form part of the village of Kankapura and as such belong to the plaintiffs?

The finding was "if necessary I would hold in the negative."

On these findings the learned Assistant Judge dismissed the plaintiffs' suit. The plaintiffs appealed to the District Court and the learned District Judge framed in substance the same two issues. On the first point he disagreed with the trial Court and came to the conclusion that the suit was not barred by the provisions of sections 118 and 121 of the Bombay Land Revenue Code and that the dispute substantially related to the title to the several properties. The learned District Judge further held that, having regard to the meagre consideration of the evidence by the trial Court, there was no real decision upon the question of title with reference to the several lands, and accordingly reversed the decree of the trial Court and remanded the suit for disposal on the merits after giving the parties an opportunity to adduce further evidence. The defendant No. 2 has appealed to this Court from the order of remand and two points have been urged in support of the appeal: (1) The lower appellate Court was not right in its view that the suit was not barred by section 121 of the Bombay Land Revenue Code. (2) In any case the lower appellate Court could have proceeded to decide the appeal on the merits on the evidence recorded by the trial Court and should not have remanded the case. The long delay that has occurred has been referred to as a further ground in support of the second contention.

As regards the first point, on looking to the order of the Assistant Survey Settlement Officer Exhibit 57 and the survey map, it is clear that this is not a question of any boundary line between two villages. The order of the Settlement Officer makes it abundantly clear that the real dispute

then was as to the title to some of these lands. The lands now in suit are claimed by the plaintiffs as owners, and I do not find any dispute as to the boundary line of the two villages or of particular survey numbers. In fact the map shows that there are no two villages as such: there is one map relating to Dahvan, Wadi and Kankapura. The situation of the various lands in dispute also shows that it is not a question of the boundary lines of the respective numbers but of title thereto. The lower appellate Court appears to me to be right in holding that there was no bar to the suit in virtue of the provisions of sections 118 and 121 of the Bombay Land Revenue Code. No other objection to the jurisdiction of the Court is taken.

As regards the second point, apparently there is some force in the argument urged on behalf of the appellant that the lower appellate Court could have proceeded to deal with the case on the merits as the evidence adduced by the parties was recorded. But, having regard to the nature of the dispute between the parties relating to the several lands, the consideration by the trial Court appears to have been too meagre. The learned trial Judge did not consider the finding on this issue to be necessary, and his treatment of the question has been too summary to be considered as a decision on the merits. In paragraphs 8 and 9 of the judgment this question has been dealt with, and having regard to the manner in which the trial Court has dealt with the question, it was open to the lower appellate Court to hold that practically there was no decision of the trial Court on the question of title. Though it does not appear from the judgment clearly as to why the learned District Judge came to the conclusion that further evidence should be allowed, it seems to us that under the circumstances it was within his power to allow further evidence; and we are not prepared to hold that the order is wrong. It does not appear what position the learned Pleader for the respondent in the lower appellate Court took up at the hearing of the appeal on this question. We, therefore, confirm the order appealed from and dismiss the appeal with costs.

We desire to express a hope that this suit will not be further delayed and that it will be heard by the trial Court as soon as possible.

Appeal dismissed.

* 1925 Bombay 153.

SHAH, A.C.J. AND KINCAID, J.

Bhikubai Yeshwantrao Mehar—Plaintiff

v.

Hariba Swalaram Mehar and others—
Defendants.O.C.J. Appeal No. 5 of 1924, decided on
30th September, 1924.* (a) *Hindu Law—Widow—Unchastity—Return*
*to chastity—Bare maintenance is due.*A widow who has been unchaste, but who is
proved to have given up the life of unchastity,
should be given bare maintenance. [P. 157, C. 2.]* (b) *Hindu Law—Maintenance—Amount of bare*
maintenance—Reference to Commissioner not
*necessary.*The question of determining the amount of bare
maintenance need not be referred to the Com-
missioner. It can and should ordinarily be fixed
by a rough and ready reference to the general
condition of the family as disclosed in the evidence.
[P. 157, C. 2.]*G. N. Thakor, Munshi and S. C. Joshi—*
for the Appellant.*M. C. Setalvad, Kanga and B. J. Desai*
—for the Respondents.FACTS:—This was an appeal from a
suit by a Hindu widow, Bhikubai
by name, for maintenance. The defence
to the suit was that she had for-
feited her right to maintenance as she had
been kept by a man Shankar, by name,
and so had been leading an immoral life.
The Trial Court held that the plaintiff had
been leading an immoral life but that prior
to the suit, she had reverted to a chaste life
and that she was entitled to starving
maintenance. A reference was made to the
Commissioner to fix the bare maintenance.
The plaintiff then filed the present appeal.[His Lordship discussed evidence and
facts and holding that the plaintiff had been
leading a life of unchastity, but that for
some time prior to the suit, had given up
her life of incontinence, proceeded:—]**Shah, A. C. J.:**—On these facts,
the question arises whether Bhikubai
has forfeited her claim to maintenance
altogether, or whether she is entitled
to bare maintenance, as the learned
trial Judge has held. It is argued on her
behalf that in view of the observations of
Chandavarkar, J., in *Parami Ramaya v.*
Mahadevi (1) she is entitled to full main-
tenance as a widow living a chaste life
would get, as she has given up the life of
incontinence.(1) (1909) 84 Bom. 278—5 I.O. 960—12 Bom. L.
R. 196.I shall, therefore, first deal with the ques-
tion as to whether she has lost her right to
maintenance generally speaking, and shall
deal with the question of her right to bare
maintenance separately.It has been argued on behalf of the
respondents that in view of the terms of the
agreement, Exhibit A, she has lost all right
to maintenance. The material clause in
the agreement is as follows:—"By the aforesaid deed or agreement I Bhikubai
widow of Yeshwantrao Sawlaram pass in writing
as follows: I will always live with my mother-in-
law Jenabai wife of Sawlaram Dbondiba Meher
and will always lead a moral life and behave ac-
cording to the duties of female (i. e.) lead a virtu-
ous life. If I fail to lead a moral life and to behave
according to the duties of female I shall not claim
the right of food and clothing (i. e. maintenance)
referred to above; similarly I will not live inde-
pendently (i. e. by myself alone)"It is urged that as her incontinence is
proved, under this clause she has lost all
right to maintenance. It is true that she
has lost the right to maintenance referred
to in the agreement. But I do not think
that this clause can be read as meaning that
if she has any right under the law in spite
of incontinence, that right is affected.
The question of her right to maintenance
must be determined according to Hindu
Law on the facts found, and it cannot be
held to be affected in any way by this
clause in the agreement, as contended on
behalf of the respondents.As regards the consequences of unchasti-
ty on the right of a Hindu widow to main-
tenance, there can be no doubt. The text
of Narada, which is referred to in Ch. 2,
section 1, p. 17, of the Mitakshara, makes
the position clear. I shall refer to the
translation of this text, as given in
Gharpure's translation of the Mitakshara,
Vyavahara Adhyaya, p. 230:—"Among brothers, if any one die without issue, or
enter a religious order, let the rest of the brothers
divide his property excepting the *stridhana* (of his
wife). They should make provision for the
maintenance of his wives till their death, provided
they preserve unsullied the bed of their lord. They
may, however, out it off in the case of those who
behave otherwise."The original word for "out off" or
"resume" used in other translations is
आच्छिद्युः (Achchindiyuh). This word
clearly indicates that they may out off or
forfeit if the widow does not lead a chaste
life, or, to use the words in the translation,
"if the widow does not preserve unsullied
the bed of her lord." Yajnavalkya's

that the authorities which were referred to in *Honamma v. Timannabhat* (3) were considered, and after quoting a passage from *Strange's Hindu Law*, at page 90 it is pointed out that :—

"In the absence of any text distinctly imposing this obligation or of any expression qualifying the right which is reserved by so many texts to those who take the husband's property, of withdrawing maintenance from an unchaste widow, it cannot (except perhaps in the case of a son) be regarded as a legal liability to be enforced in a Civil Court."

It does not appear from the judgment that the passages in the *Acharya* and *Prayaschitta Adhyaya*s in the *Mitakshara*, to which I shall presently refer, were before the Court. If any text which would support the view taken in *Honamma's* case (3) had been brought to the notice of the learned Judges, it is permissible to think that they might not have expressed their dissent in an unqualified form. It does not appear from the facts of the case in *Valu v. Ganga* (2) that the question whether the widow would be entitled to bare maintenance if she had given up the life of incontinence arose for decision in that case.

The decision in *Vishnu Shambhog v. Manjamma* (6) does not carry the apparent conflict between the two views any further. In that case the necessary facts which would raise the question of allowing bare maintenance to the widow were not alleged, and the decision proceeds upon the general ground as to whether on account of unchastity the right of the widow to maintenance is lost, even though it may have been decreed before.

I have considered the authorities which have been mentioned by Chandavarkar, J., in *Parami v. Mahadevi*, (1) and I do not consider it necessary to refer to them all in this judgment. It is sufficient to refer to the passages in the *Mitakshara*. Verse 70 in the *Acharya Adhyaya* in the Chapter relating to "Marriage", with *Vijnanesvara's* commentary thereon, is translated as follows by *Srisa Chandra Vidyarnava* in his translation of the *Acharya Adhyaya* at page 136 :—

"The author now describes how unchaste women are to be treated.

Yajnavalkya

LXX.—The unchaste wife should be deprived of authority, should be unadorned, allowed food barely sufficient to sustain her body, rebuked,

and let sleep on low bed, and thus allowed to dwell.—70.

Mitakshara.

She who commits adultery, 'should be deprived of authority' i. e., the control over servants and the management of the household etc., should be taken away. She should be kept 'unadorned,' i. e. without collyrium, ointments, white cloth or ornaments; 'with food enough to maintain her body' and sustain her life merely, and 'rebuked' with censure etc., and 'sleeping on low bed', on the ground, and 'allowed to dwell', only in his own house. This should be done in order to produce repentance, and not for purification."

In the commentary on Verse No. 72, the meaning of the word 'abandonment' is explained by *Vijnanesvara* in these terms at page 139 of the same translation :—

"The abandonment should be by not having any carnal connection with her, and by not allowing her to join in any religious ceremonies and does not mean that she should be driven out of the house, because of the rule 'she should be kept confined to one apartment' (*Manu* XI, 176 or 177).

It must be remembered, however, that these passages in terms relate to a wife and not to a widow.

In the *Prayaschitta Adhyaya* of the *Mitakshara* in Verses 297 and 298, in dealing with the question of penance, *Yajnavalkya* lays down the following rule as translated in the *Sacred Laws of the Aryas* (*Mitakshara*, Vol. II, *Prayaschitta Adhyaya*) translated by S.M. Naraharayya and published from the Panini Office, Allahabad, at page 437 :—

"It is declared that this very process (should hold good) with regard to women who have suffered degradation (from caste).

CCXCVII. (But) accommodation should be given (to them) close to the house, (and also) food and clothing along with protection."

And then in the commentary on that verse the following explanation is given of these women (p. 438) :—

"To those women, who, though have suffered degradation (from caste) and for whom the rite of presenting (disconnecting) water libations etc., have been performed, accommodation, (that is,) a small cottage built of straws and leaves should be given in the proximity of the main (building of the) house. Similarly food that is just sufficient for the maintenance of life and also raiment of a low description along with (the protection) of preventing her from being enjoyed again by another man should be given."

In the commentary on the next verse it is explained at page 439 of the same book that woman under certain circumstances may be abandoned. The following transla-

tion of Vijnanesvara's commentary on this text is material :—

"(Here) it has been said that the abandoning is with regard to these four (sorts of) women only, and, nevertheless, the idea is that among such women who (have suffered degradation from caste and) will not perform the penance, only four, (namely), one who yields herself to (her husband's) pupil etc. should be abandoned without the (allowance of the) necessities of life, (namely), clothing, food, accommodation, etc., and it is not so with respect to other (offending women). And hence, it is inferred that (in the case) of other women who have suffered degradation (from caste), all that is said as, 'accommodation should be given (to them) close to the house etc.,' (III. 297) should be done though they do not perform the penance."

These passages may go to show that in the case of woman who did not fall from the path of chastity in any of the grave manners specified in this last verse, she may be allowed to live as described in the preceding verse. It is not easy to determine whether these passages in the Achara Adhyaya and the Prayaschitta Adhyaya are applicable to the case of a widow who claims maintenance from the co-parceners of her deceased husband. I may refer to the following passage in the Vyavahara Mayukha at page 79 of Mandlik's Hindu Law :—

"As for the text :—'This same course should be followed in the case of degraded females ; food and raiment are to be given to them, and they should reside near the house' ; it is, in the opinion of some others, in reference to the husband while living."

This suggests that in the opinion of Nilakantha, it might not be so limited.

In the Vira Mitrodaya, Mitra Misra expresses an opinion, as given at page 153 of Golab Chandra Sarkar's translation of the Vira Mitrodaya in the following passage :

"As for the allowance of food and raiment even to the unchaste wives, as is declared in the following text, namely,—'Also let one act in the same manner towards even the fallen wives ; food and raiment, however, should be allowed to them, if they reside in the vicinity of the dwelling house' :—that however is to be explained as referring to the husband, consistently with what is ordained by Yogisvara after having premised the husband, as in the next,—'Deprived of her position in the family, clad in dirty clothes, living upon morsels barely sufficient for life and humiliated, an unchaste wife shall be made to lie down upon the bare earth'."

At the same time it is a reasonably possible reading of the passages in the Mitakshara particularly the passages in the Prayashchitta Adhyaya, that they refer to women

generally and are not confined to wives.

In this state of the opinions with regard to the application of these passages to the case of a widow who has been unchaste but who has reverted to the path of propriety it is not unreasonable to say that they may apply to such widows.

It is important to remember that, so far back as 1876, Sir Michael Westropp, C. J. and Nanabhai Haridas, J., accepted the view that where the widow had resumed proper ways, she might be and ought to be given bare maintenance. No doubt, in coming to that conclusion, they referred to a text of Harita, which is quoted in placita 37 and 38 of Mitakshara, Chap. 2, section 1, which has no bearing upon the question. This text of Harita has been referred to and considered by Sir Charles Sargent in *Valu v. Ganga* (2) and the view taken of Harita's text there by the learned Chief Justice is correct, if I may say so with respect. But the fact remains that in *Honamma's case* (3) the learned Judges acted upon the view that a bare maintenance could be allowed to an incontinent widow without referring to the passages in the Achara and Prayaschitta Adhyayas of the Mitakshara. I read that judgment as really applicable to the case of a widow who is proved to have given up the life of unchastity. In that case it is pointed out that the allegation that the widow was living in a state of unchastity was not proved, and it appears that the widow had gone to reside with her mother-in-law. Under those circumstances the learned Judges considered whether her incontinence had disentitled her to bare maintenance which was allotted to the widow in that case under a previous decree. The decision is really applicable and limited to the case of a widow who is proved to have ceased to lead an unchaste life. If it is read as going beyond that, it has not the support of any text or of any recognised commentator ; nor has it the support of any decision of this Court or of any other High Court. I cannot believe that the learned Judges could have meant to go beyond the strict necessity of the case and to hold that even an incontinent widow was entitled to bare maintenance.

In *Roma Nath v. Rajonimoni Dasi* (7) the learned Judges declined to apply the rule of *Honamma v. Timannabhat* (3) to

the case of a widow who was living a life of unchastity at the date of the suit. But they expressed the following opinion in the judgment at page 679 :—

"We do not decide in this case what her rights would be if she were to give up her present way of living and begin to lead a moral life; we do not say that she would not, even in that case, be entitled to claim a starving maintenance. All that we say now is, that under the existing state of things she is not entitled to maintenance of any sort."

This point has been recently considered in *Sathyabhama v. Kesavacharya* (8). The view taken by Seshagiri Aiyar, J., is that these passages in the Mitakshara go to show that the widow will get starving maintenance, though on account of unchastity, she would lose the right to the ordinary rate of maintenance. Undoubtedly this case supports the view that a widow who has been unchaste, but who has ceased to lead a life of incontinence, may be given bare maintenance, and that such right is not excluded by the text of Narada which seems to give the co-parceners the right of cutting off her maintenance.

This is the state of the authorities and the opinions with reference to this point. The question is whether there is any real conflict of decisions such as would necessitate a reference to a Full Bench. As I have already stated, the decision in *Honamma v. Timannabhat* (3) must be treated as limited to the case of a widow who has ceased to be unchaste, and cannot be read as applicable to a widow who continues to be unchaste. If the judgments in *Valu v. Ganga* (2) and *Vishnu Sahmbhog v. Manjamma* (6) are read with reference to the facts of those cases that question did not arise for decision. If *Honamma's* case (3) is read as laying down that bare maintenance should be allowed to a widow who is in fact leading a life of unchastity, there is undoubtedly a difference of opinion. But, as I have already said, the weight of opinion would be preponderatingly against the view that a widow continuing to be unchaste can get bare maintenance: and no reference to a Full Bench would be called for. Further, on the facts of this case, that question would not arise. But if the decision in *Honamma's* case (3) is, as I think it should be, restricted to the case of a widow who has really given

up a life of unchastity, there is really no conflict of decisions. In view of the concurrence of judicial opinion in the three High Courts, that a widow who has been unchaste, but who is proved to have given up the life of unchastity, should be given bare maintenance, I think that that view may be given effect to without any reference to a Full Bench. I may respectfully say that, in spite of the difficulty of applying these passages in the Mitakshara to the case of a widow who is proved to have lapsed from the path of chastity but who has improved her ways, I am of opinion that they are fairly capable of being applied to the case of such a widow, provided she has not been guilty of any such grave misconduct as has been stated in the said passages. At the same time these passages cannot be literally applied to modern conditions under which the Hindu Law is administered. While, therefore, the Court allows such a widow to live separately, it must insist upon her continuing to lead a chaste life, if she wishes to have the benefit of bare maintenance.

I am, therefore, of opinion that the conclusion of the trial Court on this point, that Bhikubai is entitled to bare maintenance, can be accepted.

The learned trial Judge has referred the question of determining the amount of bare maintenance to the Commissioner. I do not think, however, that any reference to the Commissioner is necessary. Bare maintenance can and should ordinarily be fixed by a rough and ready reference to the general condition of the family as disclosed in the evidence. It must be bare maintenance as indicated in the passages cited in this judgment. Though these passages are not capable of literal application to the case of a widow who does not live in the family house, under the law as administered now it is simply a question of determining the bare minimum which should be allowed to her under the circumstances in order to enable her to live. We asked the learned counsel for the respondents as to what amount he would suggest under the circumstances. He suggested Rs. 20 as maintenance and Rs. 5 as house rent, in all Rs. 25. The appellant's counsel has not accepted this as being a reasonable amount for bare maintenance. But his suggestion for allowing Rs. 75 or Rs. 100 per month as bare maintenance is clearly unreasonable. I am of opinion that Rs. 25

(8) (1915) 89 Mad. 658-29, M.L.J. 87-29 I.C. 897-18 M.L.T. 28.

would be reasonable as bare maintenance under the circumstances.

We modify the decree appealed from by cancelling the order or reference to the Commissioner and the other provisions in the decree incidental to the reference, and by ordering that the defendants Nos. 1 to 4 do pay Rs. 25 per mensem including house rent to the plaintiff from the date of the suit; the liability to pay in the case of defendants Nos. 2 to 4 to be limited to the estate in the hands of the Administrator-General. The amount now lying with the plaintiff's solicitors in respect of payments made under the order of the Court during the pendency of the suit to be refunded to defendants, so far as it is in excess of Rs. 25 per mensem. The excess amount paid during the pendency of the appeal to be set off against payments already due or which may fall due hereafter. In the trial Court each party to bear his or her own costs.

The appellant to pay the respondents' costs in appeal and to get the costs of cross-objections from respondents Nos. 1 to 4.

Kincaid, J.—His Lordship, on the facts concurred in the conclusions reached by the A.C.J., and continued:—

The last question is whether even on that finding Bhikubai is entitled to a bare maintenance. The case-law on the subject is not inconsiderable. The first authority brought to our notice is that of *Honamma v. Timannabhat* (3) where Westropp, C.J. held that where a widow had obtained an award of maintenance, she did not forfeit a bare maintenance by her incontinence. It should, however, be observed that the question whether she was incontinent at the time of the suit was left in doubt. The Judge of the first appellate Court did not positively find "that allegation (i.e., of continued incontinence) to be true and he did state that she resided with her mother-in-law."

The correctness of the above decision was questioned in the case of *Valu v. Ganga* (2). Sir Charles Sargent observed (p. 90):—

"In the absence of any text distinctly imposing this obligation (to give an unchaste widow maintenance) or of any expression qualifying the right which is reserved by so many texts to those who take the husband's property, of withdrawing maintenance from an unchaste widow, it cannot (except perhaps in the case of a son) be regarded as a legal liability to be enforced in a Civil Court."

In this case, too, the question whether the widow had returned to a moral life did not arise.

This authority was followed in *Vishnu Shambhog v. Manjamma* (6). But a passage which occurs to the close of Sargent, C.J.'s judgment is worthy of note (p. 110):—

"Such being the nature of the widow's right to maintenance, a decree, declaring her right, must, from its nature, be liable to be set aside or suspended in its operation on proof of such unchastity."

Here, again, the question of the widow's return to a moral life was not before the learned Judges but the words "suspended in its operation" seem to imply that a widow was to be deprived of her maintenance only so long as her unchastity lasted.

The matter was again discussed in the case of *Parami v. Mahadevi* (1) by Chandavarkar, J. Although he decided the case on other grounds he quoted with approval a text of Parashara which supports the contention that a repentant widow must be maintained. The passage runs as follows (p. 285):—

"This text of Parashara, which includes the case of a widow, is explained by Madhavacharya, [Parashara Dharma Sumbhita, Bombay Sanskrit Series Vol. II, Part I, page 352] as relating only to a woman who is leading a life of unchastity, is unrepentant, and has not performed expiatory rites. As to a woman, whether she is wife or widow, who returns to a life of chastity after she has been unchaste, Madhavacharya explains that she, after expiation, cannot be cast out of the house, but that she must be maintained."

Other High Courts, besides the Bombay High Court, have considered the same question.

In the case of *Roma Nath v. Rajonimoni Dasi* (7) their Lordships held that an unchaste widow was not entitled to a "starving maintenance," but they deliberately left open the question of her rights should she return to a moral life. They observed (p. 679):—

"We do not decide in this case what her rights would be if she were to give up her present way of living and begin to lead a moral life; we do not say that she would not, even in that case, be entitled to claim a starving maintenance. All that we say now is, that under the existing state of things she is not entitled to maintenance of any sort."

In the Madras High Court there were two similar cases. The first, however, *Kandasami Pillai v. Murugammal* (9) deals

with a wife, and is therefore hardly pertinent. Still the following passage may be quoted from the judgment (p. 8):—

"I have little doubt that before a decree for maintenance is given to a wife who has once been guilty of infidelity, she must show, not only that at the time of the plaint and the trial she was leading a chaste life, but also that she had done so for a sufficient period previously so as clearly to lead to the conclusion that she has completely renounced her immoral course, and that, in fact, she is a reformed woman."

A case exactly analogous to the present one was that of *Sathyabhama v. Kesavacharya* (8). There the learned Judges, after reviewing the authorities cited by me, came to the conclusion that an unchaste widow who had definitely repented was entitled to a bare maintenance. I quote the following passage (p. 660):—

"But in none of these (Hindu) texts is there any provision for a woman who had repented and was subsequently leading an honest life. It is not to be presumed from the omission to provide for such a contingency, that the resumption once made is to be irrevocable and that the fallen woman who had reformed is to be denied even a starving allowance."

We thus have a series of decisions that at first sight seem to conflict, but if closely scrutinized, appear not really opposed to each other. In the case of *Honamma v. Timannabhat* (3) we do not know whether the widow had reformed or not, but as she was living with her mother-in-law, their lordships seem to have believed that she had. In *Valu v. Ganga* (2) and *Vishnu Shambhog v. Manjamma* (6) the widow had certainly not reformed and in the latter case their lordships seem at any rate to have felt a doubt whether, if she had returned to a chaste life, she would not have been entitled to a starving maintenance. In *Parami v. Mahadevi* (1) Chanda-varkar, J., certainly inclined to the opinion that a repentant widow must be maintained. In *Roma Nath v. Rajonimoni Dasi* (7) their lordships deliberately refused to hold that a repentant widow had no claims. Finally in *Sathyabhama v. Kesavacharya* (8) the Madras High Court affirmatively held that a reformed widow must be given a starving maintenance.

His lordship agreed with the order proposed by the A.C.J.

Appeal dismissed: decree modified.

* 1925 Bombay 159.

MACLEOD, C.J. AND CRUMP, J.

Mani Lal Chunilal Choksi—Defendant-Appellant.

v.

Mani Lal Damodardas Mody—Plaintiff-Respondent.

O.C.J. Appeal No. 77 of 1924, decided on 3rd December 1924.

**Letters Patent (Bombay), Cl. 15—Order allowing transfer of summary suit to short causes—No appeal lies.*

An order amending the title of a plaint by omitting the word "summary" from the same, and transferring the case to the short cause list, from the list of summary suit does not in any way affect the merits of the questions, at issue between the parties by determining some right or liability. It is only an order regulating the procedure according to which the suit is to be tried. It is not therefore a judgment and no appeal lies. [P. 160, C. 1.]

B. J. Desai—for Appellant.

Kanga—for Respondent.

Macleod, C.J.:—The plaintiff filed this suit on May 24, 1924. It was described in the plaint as a summary suit. The endorsement on the plaint stated that it was a summary suit and as such, it appears, it was admitted. The cause of action arose more than six months before the plaint was filed and consequently the suit as a summary suit was barred under Article 5 of the Indian Limitation Act. When the defendants were served with the summons, defendant No. 2 took out a Chamber summons against the plaintiff, asking for an order that the suit should be removed from the list of summary suits, or in the alternative that he might be granted liberty to defend the suit and file his written statement. Strictly speaking the defendant could not be entitled to the first relief he asked for in this summons, because as long as a suit is a summary suit he cannot appear until he has got leave to defend, and it could only be when the defendant had got leave to defend that he would be enabled to ask the Court to dismiss the suit as barred by limitation. The plaintiff then took out a summons asking for an order deleting the word "summary" from the title of the plaint and annexures and transferring the suit to the list either of long causes or short causes. The two summonses were heard together. The Judge ordered that the plaintiff should be at liberty to delete the

word "summary" from his plaint and annextures within three days and that the suit should thereon be removed from the list of summary suit and transferred to the list of contested short causes. The plaintiff was also ordered to pay all the costs of the suit up to the date incurred by the defendants.

The defendants have filed an appeal against that order.

The respondents have raised a preliminary objection that the appeal is not competent. It is not disputed that an appeal can only lie under clause 15 of the Letters Patent, and the appellants must, therefore, show that the order appealed against is a judgment.

Treating the plaintiff's application as one for the amendment of the plaint, the defendants argued that if the plaint were amended it would have to be re-declared and the suit would be barred even as an ordinary suit on the date of the re-declaration. That was a wrong argument. When a plaint has to be re-declared owing to leave to amend being granted, the amendment is treated as if it had originally stood in the plaint, and an amendment has been refused on the ground that it would cause injustice to the opposite party if the effect of allowing it would be to take away from him the defence of limitation. The Judge, however, held that the declaration of a plaint has reference to the paragraphs of the plaint, and the title could be amended by deleting the word "summary" without there being any necessity to re-declare the plaint. He also pointed out that the only result of the amendment would be to deprive the plaintiff of the advantages which would accrue to him from the suit being entered as a summary suit. It would not convert the suit into another suit of a different character.

The order under appeal, therefore, is an order regulating the procedure according to which the suit is to be tried. It does not in any way affect the merits of the questions at issue between the parties by determining some right or liability. As Mr. Mulla points out in his seventh edition of the Civil Procedure Code, p. 1046, all the High Courts are agreed that no appeal lies from such an order.

Appeal dismissed.

1925 Bombay 160.

SHAH, A.C.J. AND PRATT, J.

J. Burjorji & Co.—Appellant

v.

International Banking Corporation—Respondent.

O.C.J. Appeal No. 72 of 1924, decided on 9th October, 1924.

Negotiable Instrument—Bill revolving at 30 days' sight—Revolving commences after due date and not the date of payment.

Where "Bills were drawn to the extent of yens 50,000 (Yens fifty thousand) revolving at thirty days' sight" held: that the date of actual payment of the bills should not be taken to mark the limit of time for the revolving of the credit but in accordance with the business understanding of such an arrangement it should be held that the revolving would commence after the due date of the particular bill subject to the condition that within any given period the limit of 50,000 yens is not exceeded. [P. 161, C. 2.]

Kemp and Jinnah—for the Appellants.

Coltman, Campbell and Vakil—for the Respondent.

Pratt, J.:—This appeal practically depends upon the construction of one word in the letter written by the defendants on November 25, 1919. The defendants were a firm in Bombay importing goods from H. Yamamoto & Co. Ltd., a firm in Japan. H. Yamamoto & Co., drew bills on the defendants. These bills were discounted by the plaintiffs' bank in Japan and were presented in Bombay by the bank to the defendants for acceptance and payment. H. Yamamoto & Co. wished to be assured that these bills to be discounted by the bank in Japan would be honoured when presented in Bombay. The defendants accordingly, in order to secure H. Yamamoto & Co., and to finance their imports, wrote the letter of November 25, 1919, to the plaintiffs' bank. In the first part of that letter they inform the bank that they have instructed H. Yamamoto & Co. in Japan to draw certain bills upon them. In the second part of that letter they agree to accept on presentation all the bills drawn pursuant to that authority.

The question is what bills were H. Yamamoto & Co., authorised to draw. These bills are described in the first paragraph of that letter as "Bills to the extent of yens 50,000 (yens fifty thousand) revolving at thirty days' sight."

What does this expression mean?

For the sake of simplicity suppose each bill was for the full amount of 50,000 yens.

Then, if the word 'revolving' did not occur when one bill of 50,000 yen was drawn, the authority given by the defendants would expire and no further bill could be drawn.

The effect of the word 'revolving' coupled with the last paragraph of that letter which extends the credit for a period of twelve months admittedly leads to this implication that after one bill of 50,000 yens was drawn under this authority then another bill of 50,000 yens can be drawn and so on for a period of twelve months.

The question then is how soon after the first bill of 50,000 yens can the second bill of 50,000 yens be drawn?

It seems to me obvious that this must be only after the time limited for the first bill of 50,000 yens has expired, that is, after due date of the first bill.

The contention of the defendants-appellants on the other hand is that the second bill of 50,000 yens could not be drawn until after the first bill had either been paid or accepted. I do not think that this is the possible construction of that letter. In the first place on this construction the facility given to H. Yamamoto & Co. in Japan to draw bills would depend upon an uncertain event occurring in Bombay. The letter of the defendants of the same date confirming the credit shows that H. Yamamoto & Co. of Japan did not want their credit to be dependent upon any future acts of the defendants in Bombay. Further, the contention of the defendants would lead to this result that the defendants by refusing to accept or refusing to pay the first bill of 50,000 yens would render the credit of twelve months nugatory. No further bill could be drawn in that event because the defendants had neither accepted nor paid. It is not a reasonable construction of the document that the period of revolution should depend upon defendants' volition. The whole object of the arrangement was to facilitate the defendants' import of the goods from Japan and the construction which gives business efficacy to the document is that of the trial Judge. Mr. Kemp argues that this construction extends the limit—so it does—but a limit of 50,000 yens absolute is not the same as a limit of 50,000 yens revolving.

1925 B/21 & 22

I would, therefore, confirm the decree of the lower Court and dismiss the appeal with costs.

Shah, A. C. J.:—I have felt some difficulty in coming to a conclusion in this case. Taking the three letters, which are material in this case, namely, Exhibits A, B and C, it appears that the revolving credit for 50,000 yens given by the defendants to the firm of H. Yamamoto & Co., Ltd. for twelve months was confirmed. The question is as to whether the revolving credit would be dependent upon the payment by the defendants of the bills drawn on them after acceptance. The contention of the defendants is that until the payment is made by them the credit does not commence to revolve and so long as the sum is unpaid, the sum unpaid must be taken into account in determining whether at any given time the extent of the credit mentioned in the letter is exhausted or not. It has been pointed out in the judgment just delivered by my learned brother that that would involve this result that the extent of the credit would be dependent upon the fulfilment by the defendants on their part of the undertaking, namely, the payment of the bills in Bombay. It was a necessary part of the arrangement evidenced by these letters, that the firm in Japan was to be assured that the bills up to a certain limit within twelve months would be discounted by the plaintiffs' bank in Japan. That purpose would not be served if the construction contended for by the defendants is accepted. Having regard to the wording of the letter, dated 25th November, 1919 it is fair to hold that the expression "with recourse to the extent of 50,000 yens revolving" means that the bills not exceeding 50,000 yens could be discounted in Japan without any reference to actual payment of the bills in Bombay by the defendants so long as the limit was not exceeded during the time when the bills would become due. Instead of taking the actual payment of the bills to mark the limit of time for the revolving of the credit, it would be more reasonable, and in accordance with the business understanding of such an arrangement to hold that the revolving would commence after the due date of the particular bill subject to the condition that within any given period the limit of 50,000 yens is not exceeded.

I, therefore, concur in the order proposed by my learned brother.

Appeal dismissed.

1925 Bombay 162.

MARTEN AND FAWCETT, JJ.

Nur Mahomed Beg Mahomed—Plaintiff-Appellant

v.

G. Monteath—Defendant-Respondent.

F. A. No. 189 of 1924, decided on 18th August, 1924, from the decision of the District Judge, Poona, in Suit No. 37 of 1924.

(a) *Practice*—New plea—Plea as to jurisdiction may be raised in appeal.

* Plea as to want of jurisdiction may be raised for the first time in appeal. [P. 162, C. 2.]

(b) *Cantonments (House Accommodation) Act* (VI of 1923), Ss. 30 and 7—Notice issued under S. 7—Person aggrieved can appeal under S. 30—No other remedy open.

A person aggrieved by the issue of a notice against him under S. 7 for vacating a house in the Cantonment, has only one remedy open to him namely, to appeal under S. 30, whether the notice is legal or not. Civil Courts have no jurisdiction to entertain a suit in respect of such notice. [P. 164, C. 1.]

Chimanlal Setalvad and *B. J. Desai*—for the Appellant.

Kanga and *S. S. Patkar*—for the Respondent.

Marten, J.:—This is an appeal from the judgment of the District Judge of Poona, dismissing the plaintiff's suit for an injunction to restrain the District Magistrate from evicting him from his bungalow. The matter arises under the Cantonments (House-Accommodation) Act, 1923, which is an Act of the Imperial Legislature, and is not a Bombay Act as is inaccurately stated in the Memo of Appeal.

Shortly stated, the plaintiff claims that the cantonment authorities had no jurisdiction to issue a notice under section 7 of the Act, requiring him to vacate and to execute a lease in favour of the military authorities, because under section 10 (c) the house in question is "occupied by the owner," namely, the plaintiff. In the present case two notices were given on 14th May, Exhibit 25 and Exhibit 26. On 12th June, the District Magistrate gave notice in effect that he might be obliged to enforce the surrender of the house under section 12 of

the Act; and on 14th June, this suit was filed.

So far as the merits of the case are concerned, the matter turned in the Court below on whether the plaintiff could be said to be in occupation as owner, although he was not actually in residence at the time when the notice was given. It was common ground that he had been in actual residence for the Poona Racing Season of 1923, and had not given up his residence until some time in October, 1923. It was further common ground that he actually lived in the house for a day or two in April and May, 1924, and it was alleged by the plaintiff that extensive repairs to the house had been made by him during or up to those months.

The learned District Judge decided first of all on issue No. 1 that the Court had no jurisdiction to entertain the suit because the District Magistrate was protected by section 38 of the Act from having any suit brought against him inasmuch as he had acted in good faith. Then in answer to issue No. 2 the learned Judge held that the District Magistrate might be sued just like any other Government official. But that issue of course must not be confused with issue No. 1. The learned Judge was there considering this issue quite irrespective of the effect of section 38 of the Act. Then when he came to what I will call the merits of the case, viz., issue No. 4, he held that on the true construction of the Act and in the events which had happened the plaintiff was not in occupation of the house when the notice was issued. Accordingly he dismissed the plaintiff's suit with costs.

Before us in addition to the point of jurisdiction raised in the Court below, viz., the one under section 38 of the Act, a further point of jurisdiction has been raised. This is that under sections 30 and 32 a remedy is provided for an aggrieved owner, viz., to appeal to the Officer Commanding the District, and that the decision on such appeal is directed by the Act to be final and is not to be questioned in any Court on any ground otherwise than on the ground that the house is situate in a cantonment or part thereof in which the Act is not operative.

I prefer to take this second point first, and the fact that it was not taken in the Court below is in my opinion immaterial this being a question of jurisdiction. Now

in the first place one has to bear in mind what this particular cantonment actually is. The history and legal position of the Poona Cantonment was considered by their Lordships of the Privy Council in *Kaikhusrü Aderji v. Secretary of State* (1) and in effect after considering the history of the cantonment they held that the plaintiff in that case was not an owner in the ordinary acceptation of the word but was merely a licensee. At p. 20 Lord Robson in delivering the judgment of the Board said:—

"These circumstances tend to show that the appellants' predecessors in title did not regard the property as differing in its tenure and terms from other property in the cantonment.

Their Lordships are of opinion that the appellants are mere licensees, and that the land in question has been lawfully resumed by the Government, and they will therefore humbly advise His Majesty that this appeal should be dismissed with costs."

The result, therefore, is that we must not approach the present question in the way that we would do if the land was not inside a cantonment. In an ordinary case one requires a clear provision to show that an owner in fee simple of land is to be ousted by any outside authority. But if one remembers that this cantonment is primarily a military area, and that the ordinary members of the public are only there as it were on sufferance and subject to the main object of the cantonment, which is for the benefit of the military and for military use, then I think that certain provisions in the Act which might otherwise appear to be rather harsh, assume quite a different aspect, when one realises what was in the mind of the legislature. One has also to bear this in mind that the Act we are dealing with is one of 1923 and accordingly was passed by what may be styled Popular Assemblies. Similarly the Cantonments Act now regulating the Cantonments generally is not an old Act, but is a recent Act.

Turning then to the scheme of the 1923 Act, one finds in section 3 that the local Government with the previous sanction of the Governor General in Council may declare the Act to be operative in any cantonment or part of a cantonment situate

within the province otherwise than within the limits of a Presidency Town. Then section 5 provides that every house situate in a cantonment is liable to appropriation by the Government on a lease in the manner and subject to the conditions thereafter provided. Next as a result of sections 6 and 7 if the Commanding Officer of the Cantonment is satisfied that the house is required for military occupation and is suitable as such, then he may, with the previous sanction of the Officer Commanding the District, require the owner to execute a lease of the house for a certain period, and require the existing occupier if any to vacate the house. Then there are various provisions which follow on that. Next, sections 9 and 10 contain certain exceptions in favour, for instance, of hospitals and trade or business premises and so on. One of these exceptions is section 10 (c) which is in effect that no notice shall be issued under section 7 if the house is occupied "by the owner."

Then follow numerous other sections for carrying out the main purpose of appropriation. Section 15 gives power to the owner to have the matter referred to a Committee of Arbitration under the Act if he is not satisfied, for instance, with the rent offered him. Then in Chapter IV, sections 19 to 28, there are provisions for this Committee of Arbitration, and section 28 (3) provides that "save as provided in this Act, the decision of a Committee of Arbitration shall be final and shall not be questioned in any Court."

Next we come to Chapter V which deals with appeals. Section 29 gives a right of appeal from a Committee of Arbitration to the "principal Civil Court having ordinary original Civil jurisdiction in the cantonment, and the decision of such Court shall be final." Then in section 30 we have it expressly that "the owner... of a house in respect of which a notice has been issued under section 7 may appeal to the Officer Commanding the District or, if that officer is the Commanding Officer of the cantonment, to the General Officer Commanding-in-Chief, the Command, against the decision of the Commanding Officer of the Cantonment to appropriate the house." Section 32 provides that "the decision on any such appeal of the Officer Commanding the District or, of the General Officer Commanding-in-Chief, the

(1) (1911) 36 Bom 1=33 I.A. 204=10 M.L.T. 97=15 C.W.N. 909=(1911) 2 M.W.N. 23=13 Bom. L.R. 788=14 C.L.J. 268=12 I.O. 117=21 M.L.J. 1100=8 A.L.J. 1319 (P.O.).

Command, as the case may be, shall be final, and shall not be questioned in any Court otherwise than on the ground that the house is situate in a cantonment, or part of a cantonment in which this Act is not operative." The proviso to the section expressly enacts that the appellant is to be given a reasonable opportunity of being heard in person or through a legal practitioner. Then lastly, we get section 38 which provides that "No suit or other legal proceeding shall lie against any person for anything in good faith done, or intended to be done, under this Act or in pursuance of any lawful notice or order issued under this Act."

Now the argument of the appellant here is that section 30 does not apply because the notice under section 7 was an illegal notice, and consequently section 30 only applies to legal notices and not to illegal ones. Stopping there for a moment, these are not the words of the Act. The words are, taking them shortly, that the owner may appeal against the decision of the Commanding Officer to appropriate the house. On what particular ground such an appeal may be based, or on what particular ground the original decision to appropriate was made, would appear to be immaterial, if one only takes the mere words of that section. It would be sufficient if there was a decision to appropriate. There would then be a remedy to the owner against this decision of the Commanding Officer of the Cantonment, *viz.*, to appeal to the Officer Commanding the District.

This view is, I think, made quite clear by the exception to section 32; for that exception expressly applies to a case where the objection is that the house is not situate in a part of the cantonment in which the Act is not operative. Therefore section 32 contemplates that the notice under section 7 referred to in section 30 may itself be an illegal notice because it has been given in respect of a house to which the Act does not apply. In other words section 32 contemplates a final decision in all cases under section 7 whether the notice was legal notice or an illegal notice, except in the one case where the allegation is that the house is situate in a cantonment or part of a cantonment where the Act is not operative at all.

In our opinion, therefore, the plaintiff's proper remedy was the one provided by

the Act, *viz.*, to appeal under section 30, and not to take proceedings in the local Civil Court. It was argued on his behalf that the remedy given by the Act was only permissive. It was urged that the words were "may appeal" not "shall appeal", and that consequently the plaintiff's remedies in the ordinary Civil Courts of the land were not excluded. That argument to my mind is wholly unsound. It has been laid down in India, as well as in England, in many cases that where the legislature provides a particular remedy for a particular act, then speaking generally an aggrieved person must first follow that remedy before he takes other proceeding. This is specially so when you find particular powers or a particular special jurisdiction conferred or established under certain Acts.

Thus in *Bhaishankar v. Municipal Corporation of Bombay* (2) a question arose under the City of Bombay Municipal Act as to whether the High Court had jurisdiction to entertain any suit questioning the decision of the Chief Judge of Small Causes Court on the validity of a contested election. There Sir Lawrence Jenkins came to the conclusion that the jurisdiction of the Court was impliedly excluded. At p. 609 he said:—

"But under S. 33 the Chief Judge has jurisdiction to determine the validity of a contested election, and so he is the tribunal appointed by the Act for that purpose.

But where a special tribunal, out of the ordinary course, is appointed by an Act to determine questions as to rights which are the creation of that Act, then, except so far as otherwise expressly provided or necessarily implied, that tribunal's jurisdiction to determine those questions is exclusive.

It is an essential condition of those rights that they should be determined in the manner prescribed by the Act to which they owe their existence. In such a case there is no ouster of the jurisdiction of the ordinary Courts, for they never had any; there is no change of the old order of things; a new order is brought into being.

Here not only is the Chief Judge appointed the tribunal, but it also is expressly provided that his order shall be conclusive, and that every election not called in question in accordance with the provisions of S. 33 shall be deemed to have been to all intents and purposes a good and valid election."

No doubt that particular case is distinguishable on the facts, but it is useful for reference on the question of principle. In

(2) (1907) 31 Bom. 604 = 9 Bom. L. R. 417.

the present case having regard to the fact that we are dealing with a cantonment, I think we have an area which is subject to extremely special conditions and where the rights of the lay occupants within that area are only those which are given by the legislature. Accordingly, under all the circumstances I am of opinion that the plaintiff's proper remedy was to appeal under section 30, and that not having done so he cannot bring any suit in the ordinary Civil Courts of the land.

Under these circumstances it is unnecessary to consider whether this Court would have any and, if so, what power to see that the matter was properly determined by the Commanding Officer of the District under section 32 of the Act. But in case it should be thought that I am in any way casting any doubts on his powers or suggesting that any interference by this Court on, say, a point of law would be easily obtained, I may refer for the general principles governing such interferences in England to two cases in the House of Lords, viz., *Board of Education v. Rice* (3) and the observations there of Lord Loreburn at p. 182; and *Local Government Board v. Arlidge* (4), where Lord Haldane at pp. 132 and 133 indicated the limited interference which the English Courts in certain cases would make supposing that the tribunals appointed under the Act declined in effect to carry out the judicial or semi-judicial duties imposed on them by the Act.

In the view then which I take this suit must be dismissed on the ground I have already mentioned. Under these circumstances it becomes unnecessary for this Court to give a definite decision on the other point of jurisdiction, viz., under section 38, as to whether the District Magistrate would in any event be protected inasmuch as his acts were admittedly done in good faith. This raises a question on the construction of the Act which has given rise to considerable argument, and personally I do not propose to give any opinion on it. But it must not be understood that in deciding this case on the first ground, I necessarily imply that the judgment of the

learned trial Judge could not also be sustained on the second ground of jurisdiction.

Then there is one further point which I may briefly mention, and that is the question of the merits of the suit. Naturally as we have only heard counsel on the question of jurisdiction, the merits of the case have not been gone into. But it is only I think fair to the military authorities to point out that there is in evidence in this suit a letter from the plaintiff, dated May 27, 1920, Exhibit 34, in which the plaintiff, when he obtained the sanction of the military authorities to the transfer to himself of the suit property, stated as follows: "I undertake that the bungalow will always be available for occupation by a military officer on duty in the station, and that if so required, I will not, as owner, claim to reside in it."

It was strongly contended by Sir Chimanlal Setalvad for the plaintiff that no issue was raised on this letter, and that various defences or answers might have been made to it, in the Court below if any such issue had been raised. But this letter is in evidence, and if we had to go into the merits of the case, the matter of this letter would have to be considered along with the other points urged on his behalf by counsel for the plaintiff. After all he is seeking an equitable remedy, viz., an injunction. But injunctions are not usually granted to assist a man in breaking his own written undertaking. He who seeks equity must do equity.

In the result therefore, we arrive at the same conclusion as the learned District Judge did, though on different grounds. Accordingly the appeal will be dismissed with costs.

Fawcett, J.—My learned brother has dealt so clearly and fully with the main question before us that I have little to add.

The plaintiff is no doubt the owner of the house in suit. But, as already pointed out by my learned brother, the conditions surrounding that ownership are very different to those of an ordinary ownership of a house in a town or village. The learned Counsel for the appellant in the course of his argument contended that the observations of Sir Lawrence Jenkins in *Bhaishankar v. The Municipal Corporation of Bombay* (2) would not apply in the present instance, because the plaintiff's right to remain in undisturbed possession or occu-

(3) 1911 A.C. 179=80 L.J. K.B. 796=104 L.T. 689=75 J.P. 898=9 L.G.R. 652=55 S.J. 440=27 T.L.R. 878.
(4) 1915 A.C. 130=84 L.J.K.B. 72=111 L.T. 905=79 J.P. 97=12 L.G.R. 1109=30 T.L.R. 672.

pation of his house was not a right which is a creation of the particular Act under consideration, viz., the Cantonments (House-Accommodation) Act, 1923, and that therefore the rule about the ouster of the jurisdiction of the ordinary Courts, which is discussed in that case, does not apply to him, and that his right is one entirely outside the Act. I think that contention is clearly erroneous. First of all, taking the Act as it stands, its main provision is the general statement contained in section 5 of the liability of every house in a cantonment or part of a cantonment to which the Act applies, to appropriation in the manner and subject to the conditions mentioned in the Act. The right of the plaintiff, if any, to exemption from that particular liability is one which is created by the Act itself in section 10, sub-clause (c), and so far as he has a right to get out of the liability, it is one which is expressly created by the Statute.

Apart from this, I happen to know a good deal about the old Cantonment Regulations, specially those applicable to the Poona Cantonment, and about the history of the legislation on this subject which started with the Cantonments (House-Accommodation) Act of 1902. In connection with the litigation which resulted in the decision of the Privy Council in *Kaikhusr Aderji v. Secretary of State* (1) I had as Remembrancer of Legal Affairs to go a great deal into questions of this kind. Consequently I know that the old regulations, which applied to the Poona Cantonment among others in the Bombay Presidency from very early days, contained a provision under which houses in the cantonment were subject to a liability of the same kind as that now provided for in this Act of 1923. I may refer in this connection to the recitals which are contained in the preamble to Act II of 1902. This runs as follows :—

"Whereas various conditions, rules, regulations and orders have from time to time been laid down by, or by the authority of, the Government in regard to the grant of land and the occupation of land and houses in cantonments, with the object of securing, amongst other things, that houses built on such land should be made available when required for the accommodation of military officers; And whereas, notwithstanding the said conditions, rules, regulations and orders, difficulties have frequently been experienced in obtaining house-accommodation in cantonments for military officers, and it is expedient to make better

provision for that purpose; It is hereby enacted as follows."

I am also aware that in these old regulations there was no exception in favour of the owner of a bungalow, such as is now contained in section 10 of the Act of 1923. This exception was first enacted in the corresponding section 11 of 1902. That was a special privilege given to the owner for the first time. Previously to that, all that the owner of a house could ask for was that his house should be bought under an option of the kind mentioned in section 14 of the Act of 1902 and section 13 (1) of the Act of 1923. Therefore I entirely deny that the plaintiff's right is one which is not a creation of the Statute under consideration. I also think that, as my learned brother has pointed out, section 32 is conclusive against the contention that an appeal under section 30 lies only with regard to subsidiary questions such as the suitability of the house for occupation by a military officer or a military mess, and the necessity for enforcing the liability, and that section 30 does not apply to a case where the legality of the notice is disputed.

I agree, therefore, that the rule to which my learned brother has referred clearly applies in the present case, and that accordingly the Civil Courts have no jurisdiction to grant the injunction which the plaintiff seeks in this suit. It is obvious that the plaintiff cannot, merely by his omission to appeal, be in a better position than if he had appealed and got a decision against him under Ch. V of the Act of 1923.

In regard to the other question under section 38, I think (without deciding the question) that there is considerable force in the contention of the learned Advocate-General that the District Magistrate (the defendant in this case) is protected under the first part of that section, so long as his threat was made in good faith, and that it is not necessary to show that the notice or order was a 'lawful' one, inasmuch as his authority to enforce the surrender of the house is conferred upon him by the direct enactment in section 12 of the Act, and is not merely derived from notice or order issued under section 7 of the Act. I am inclined to think, without deciding the point, that the second part of the section about acts "in pursuance of any lawful notice or order" is intended to apply to cases where the only authority for a

person's action is such notice or order, e.g., if he does something that he is required to do by notice, or if he, being a person not directly authorised under the Act to carry out a notice, does so in pursuance of an order from the military authorities. But section 12 gives direct authority to the District Magistrate, or his nominees, to enforce the surrender of the house on the occupier failing to vacate in pursuance of a notice issued under section 7. If it was intended that the District Magistrate should only be protected, when there is no possible question as to the legality of the notice, it would have been easy to insert the word "lawful" before "notice" in section 12; and it seems to me improbable that the legislature intended that the District Magistrate, in exercising his powers under section 12, should only be protected, if the notice is shown to be not open to any doubt as to its legality. However, it is not necessary to decide this point, and I agree with my learned brother that it should be left open for subsequent decision, if that may be found necessary.

I concur in the orders proposed by my learned brother.

Appeal dismissed.

1925 Bombay 167

MARTEN, J.

Mahomedally Ebrahimji Leheri—Plaintiff

v.

Haji Abdulla Kazim—Defendant.

O. C. J. Suit No. 3356 of 1924, decided on 11th November, 1924.

Transfer of Property Act, S. 106—Monthly tenancy—Notice to quit on last day of month is valid.

In the case of a tenancy from month to month a notice to quit on the last day of the tenancy is a valid notice. (22 B. 241, *Foll.*). [P. 167, O. 2.]

Davar—for the Appellant.

Respondent in person.

Marten, J. :—It is clearly proved here that the plaintiff is the owner of a building known as Leheri Mansion in Sandhurst Road and that the defendant is a monthly tenant of a portion of that property. Under the decree of March 24, 1924, in Suit No. 4017 of 1923, the standard rent of that property has been fixed at Rs. 530

per mensem. I find as a fact that the monthly tenancy runs from the first day of each month to the last day of each month according to the English dates.

On July 31, 1924 the attorneys for the plaintiff gave the defendant notice to quit in the following terms so far as material :—

"We have to call upon you to quit and deliver quiet and peaceful possession of the portion...occupied by you for the purposes of your hotel as our client's monthly tenant at the end of next month (i.e., August 31, 1924). In default our client will file an ejectment suit against you to recover possession of the said premises at your risk as to costs, which please note." ♦

The point is whether a notice to quit on the last day of the month, viz., August 31, 1924, is invalid inasmuch as the tenancy would not expire until the end of the day constituting August 31, 1924. Counsel has pointed out that under section 106 of the Transfer of Property Act, a notice to quit may be by a notice expiring with the end of a month of the tenancy, in the absence of any contract or local usage to the contrary. In the present case, I think, having regard to what is said in *Bhojabhai v. Hayem Samuel* (1), that local custom probably requires a month's notice in the case of property in Bombay like the property in the present case, and that accordingly the fifteen days' notice mentioned in section 106 would be insufficient.

But there is nothing whatever in the local practice, so far as I am aware, to suggest that a notice expiring with the end of a month of the tenancy would not be a proper notice in the case of a month's notice as opposed to a fifteen days' notice. On the contrary in *Kikabhai v. Kalu* (2), a case which was decided by Sir Charles Farran and Mr. Justice Hosking, a notice was given to quit on March 31, 1892, and that was held to be a good notice. That was a case where the tenancy was an annual tenancy and where the notice to be given was a six months' notice. So that case is in effect an authority for the proposition that a notice to quit on the last day of the tenancy is a valid notice.

Then counsel has been good enough to draw my attention to a recent English case of *Simmons v. Crossley* (3), where the question was what notice must be given to

(1) (1898) 22 Bom. 754.

(2) (1896) 22 Bom. 241.

(3) (1922) 2 K.B. 95.

determine a monthly tenancy. What happened there was that the landlord thinking that the tenancy was longer than a monthly tenancy gave a six months' notice to determine the tenancy, and notice was given to quit on September 29. That date, it will be observed, is one day short of the actual end of the month, viz., September 30. Accordingly it was argued that the notice to quit was bad inasmuch as it was given for one day short of the end of the month, and that it could not be given for any day other than the last day of the month. There counsel for the tenant contended that the notice must expire either on the last day of one month or on the first day of the next month calculated at the date of its commencement and at no other time.

But the actual decision of the Court was that all that was required was a reasonable notice, and that it can be given for some day other than the last day of a month. But there it will be observed the notice was a very long one. If the length of notice had been under a month, then it would clearly have been invalid, but being so long as six months the Court held that the landlord could fix a different date for the termination than the mere end of a calendar month. Many authorities were there cited by the learned Judges, and the importance of the case to us in the present suit is that it was conceded that a notice expiring on the last day of a month would be good.

So, too, in *Ismail Khan Mahomed v. Jaigun Bibi* (4) the English case of *Page v. More* (5) was relied on by the tenant as showing that a notice to quit at noon on the last day is bad. But that case was held distinguishable in the Calcutta case where the notice to quit was not at any particular time on the last day of the tenancy but merely before it. I, however, notice that according to p. 572 of the report the notice to quit was not "before" the last day but "by" the last day of the particular Chait year.

Then in *Harihar Banerji v. Ramsashi Ray* (6) their Lordships of the Privy

Council have considered this question of notices to quit, and they say:—

"It has not been suggested, and could not, their Lordships think, be successfully contended, that the principles they lay down are not equally applicable to cases arising in India. They establish that notices to quit, though not strictly accurate or consistent in the statements embodied in them, may still be good and effective in law; that the test of their sufficiency is not what they would mean to a stranger ignorant of all the facts and circumstances touching the holding to which they purport to refer, but what they would mean to tenants presumably conversant with all those facts and circumstances; and further, that they are to be construed not with a desire to find faults in them which would render them defective but to be construed *ut res magis valeat quam pereat*."

On these authorities then I hold that this notice did not mean that the tenant was to give up possession at any definite hour prior to midnight on August 31, 1924, and that accordingly the notice in my opinion was a valid notice. It is clear that the Bombay Rent (War Restrictions) Act expired on or before August 31, 1924, and in my opinion there was nothing in that Act which would prevent the landlord from giving notice to quit at the expiration of that Act. [His Lordship then dealt with other matters arising in the case and passed a decree in ejectment as prayed for.]

Suit decreed.

1925 Bombay 168.

SHAH, A.C.J. AND KINCAID, J.

Ladhuram Manormal Marwadi—Defendant-Appellant

v.

Sale Mahomed Illiyas Memon—Plaintiff-Respondent.

S. A. No. 61 of 1923, decided on 29th August, 1924, from the decision of the District Judge, Nasik, in Appeal No. 163 of 1921.

Lease—Construction—Rent note silent as to payment of assessment—Assessment enhanced—Tenant must pay excess over the rent fixed.

An agreement was made as long ago as 1882 whereby a tenant took building site from landlord on a fixed rent of Rs. 19 which, as agreed between them was not to be enhanced. In 1915 the Government increased the assessment on the land from annas 15, pies 3 to Rs. 59 and odd. Tenant contends that in spite of this increment, landlord must pay the assessment as he had been admittedly paying so long. *Held*, that though deed was silent on the point, the tenant must pay to landlord the difference between Rs. 59 and odd and Rs. 19. [P. 170, C. 1.]

(4) (1900) 27 Cal. 570=4 C.W.N. 210.

(5) (1850) 15 Q.B. 684.

(6) (1918) 46 Cal. 458=45 I.A. 222=23 C.W.N. 77=16 A.L.J. 969=35 M.L.J. 707=29 C.L.J. 117=9 M.L.W. 148=25 M.L.T. 159=48 I. O. 277=21 Bom. L.R. 522=(1919) M.W.N. 471 (P.O.).

D. R. Patwardhan—for the Appellant.

D. C. Virkar—for the Respondent.

Shah, Ag.C.J.—The few facts relating to this second appeal are these. On March 9, 1882, a document which is described as *Kararnama*, was executed by Kashi Bahiru Patil to Hormasji Burjorji in respect of land which is described as Prat Bandi No. 49, Plot No. 1, measuring three acres and two gunthas, the assessment of the land being Rs. 0-15-3. Another document was executed by Hormasji Burjorji on the same day, which is described as a rent-note. It will be sufficient to refer to the terms of this rent-note for the purposes of this appeal. After the description of the land, the document contains the following terms:—

"This rent-note is passed in respect of the whole land as such. The rent in respect of the land as is included within the boundaries as mentioned above shall be paid by us from this day every year annually at the rate of Rs. 19 per year immediately on the completion of the respective year and in case there happens to be any default in payment as above, then we shall be paying interest on the overdue sum of rent, at the rate of two per cent. per month. In case we happen to sell to any the buildings standing on that land or if they are given away by way of gift to any one, then you should recover the rent as mentioned above from such person (transferee); you shall not have the right to recover more rent and you should not take it. We shall go on paying rent as mentioned above as long as we and our heirs make use of the said land abiding by the terms of this *Karar*; we shall enjoy the buildings and the *Agar* and the *Gardens*, etc., in this land in any way we like and if any one sets up his claim against this land, it is you who are to ward off the same and we shall not be caused any trouble in that behalf."

The tenant Hormasji Burjorji put up a bungalow on this land, and he remained in possession of the land on the terms stated in this document. He transferred his rights to the present plaintiff, and the present defendant claims to be a purchaser from the original owner Kashi Bahiru Patil.

In about 1915, the Government increased the assessment of this land to Rs. 59-8-6, apparently on the basis of its being a building site. The present defendant filed a suit in the Court of Small Causes to recover the increased assessment for three years from the plaintiff, and the plaintiff filed the present suit in March 1921 for a declaration that Kashi Bahiru Patil or any persons claiming through him had no right to ask for more than Rs. 19 a year as rent for the land in suit. The defendant

pleaded that as the assessment was increased, the plaintiff was liable to pay the full amount of the assessment.

On a construction of the rent-note the learned trial Judge came to the conclusion that the plaintiff was entitled to the declaration sought, and that the defendant was not entitled to recover anything more in respect of this land than Rs. 19 a year. Accordingly the trial Court granted the declaration asked for.

The defendant appealed to the District Court and the learned District Judge considered the point whether the respondent (plaintiff) was entitled to the declaration sought by him under the document of March 9, 1882. He found that point in the affirmative, and subject to a slight verbal alteration he confirmed the decree of the trial Court.

The defendant has appealed to this Court, and it is urged on his behalf that as there was no express agreement between the parties in 1882 as to who should pay the assessment and the assessment now levied is far in excess of the amount fixed as rent, in equity he should not be required to pay the assessment in respect of this land to the Government for the benefit of the plaintiff. It is urged that the plaintiff as the occupant of the land should ultimately bear the burden of this increased assessment, and that the terms of the document do not in any way come in the way of that equitable course being adopted. Reliance is placed on behalf of the appellant upon the observations in *Ranga v. Suba Hegde* (1). In that case in respect of the land originally held on a permanent tenure the *mul-vargdar* or superior holder was held not entitled to raise the rent against the *mul-gainidar* on the ground that the assessment on the land had been enhanced at the Government survey. It appears from the facts in that case that the increased assessment did not exceed the amount of the rent fixed. The learned pleader for the appellant has argued that the ground upon which the Court allowed the local fund cess to be levied from the tenant in addition to the fixed rent would equally apply to a case of this kind.

On behalf of the respondent it is urged that the rent is fixed under the documents that were executed between the parties in 1882, and, according to the terms of the

contract entered into, the defendant is entitled to recover Rs. 19 per year as rent and nothing more. It is argued that it is a necessary implication of these terms that the assessment was to be payable by the landlord or the superior holder. It may be mentioned here that it is an admitted fact that from 1882 up to 1915 the small assessment of Rs. 0-15-3 in respect of this land was paid by the landlord and not by the tenant. In support of his contention, the learned pleader for the respondent relies upon the decision in *Babshetti v. Venkataramana* (2). A reference has been made also to the decision in *The Secretary of State v. Fernandez* (3).

It seems to us that the decision in this case must depend upon the construction of the documents that were passed between the parties in 1882. It is clear that the rent was fixed at Rs. 19. There is no express reference to the payment of assessment and the uniform course of conduct of the parties from 1882 to 1915 shows that the assessment was intended to be paid by the landlord. At that time the parties did not anticipate and did not provide for such increase as was made in the assessment in 1915. Having regard to the terms of the documents, it seems to us that so long as the assessment does not exceed Rs. 19, the landlord must bear the burden of that increase in the assessment. But when the assessment is increased to such an extent that it exceeds Rs. 19, a situation arises in respect of which it must be admitted that the documents are silent, and it is difficult to hold as a necessary implication of the terms of the documents, that even though the assessment may be enhanced beyond Rs. 19, still the landlord was to pay such enhanced assessment for the benefit of the tenant or the actual occupant of the land.

Having regard to the *ratio decidendi* in the two cases decided by this Court, to which we have already referred, it seems to us that the correct view to take with reference to the increased assessment, so far as it is in excess of Rs. 19, is that the burden must ultimately fall on the actual occupant, i.e., the tenant, whom the plaintiff now represents. It is quite true that in the Madras case the increased assess-

ment was slightly in excess of the amount of the rent fixed, but the decision was with reference to a different point. The question there was whether the Government would be entitled to get the benefit of S. 69 of the Indian Contract Act, and the question that arises for our consideration in this appeal did not arise, and was not considered, in that case. Among the other decisions which have been referred to, no case, in which the enhanced assessment has exceeded the amount of the fixed rent, has been brought to our notice. We have referred to the judgment in *Babshetti v. Venkataramana* (2). On referring to the paper book, it appears that the enhanced assessment did not exceed the rent fixed under the document: and the decision is based upon the express terms of the particular document. We do not think that the decision can be treated as an authority for the contrary view in this case, where we have to interpret the document in question, in which there is no express provision as to the payment of assessment. In this particular case there is a substantial excess over the rent fixed, and it would not be equitable to hold that the landlord should pay the enhanced assessment for the benefit of the tenant. At any rate in the present case, on the terms of the contract between the parties, and the nature of the agreement, it cannot be said that it has been provided between them that the landlord shall pay such excess and we cannot treat it as necessarily implied by the terms of the agreement.

We, therefore, vary the decree of the lower Court by adding that the declaration granted by the lower Court will be subject to the proviso that the excess of the assessment, including the local fund cess, over Rs. 19, shall be payable by the plaintiff to the defendant.

Having regard to the result of the case we direct that each party should bear his own costs throughout.

Decree modified.

**** 1925 Bombay 170.**

MACLEOD, C.J. AND CRUMP, J.

Emperor

v.

Nathu Kasturchand Marwadi.

Criminal Application for Rev. No. 229 of 1924, decided on 12th November, 1924.

(2) (1879) 3 Bom. 154.

(3) (1907) 30 Mad. 375 = 17 M.L.J. 337 = 2 M.L.T. 320.

“(a) *Crim. Pro. Code, S. 342*—Accused is to be examined after all evidence against him is over.

The Code intends that the accused shall be given an opportunity of explaining any circumstances appearing in the evidence against him. That must mean the whole of the evidence against him, and any examination under S. 342 before that evidence is closed cannot possibly fulfil the conditions of the section. The stage in the trial prescribed by S. 342, when accused has to be questioned generally on the case for the prosecution, is after the prosecution evidence is complete and before he is called upon to enter on his defence. [P. 172, C. 1.]

(b) *Crim. Pro. Code, S. 256*—Obligation under S. 256 is different from that under S. 342—*Crim. Pro. Code, S. 342*.

There can be no difference in the meaning between the words “called upon to enter upon his defence” in S. 256 and “called on for his defence” in S. 342. (1923 Cal. 727, Appr.) The obligation imposed by S. 256 on the Magistrate to ask the accused whether he wishes to cross-examine the prosecution witness is quite distinct from the obligation imposed by S. 342 to question the accused generally for the purposes mentioned therein. [P. 172, C. 2.]

S. R. Parulekar—for the Applicant.

G. R. Madbhavi—for the Opponent.

Macleod, C. J.—The accused was charged before the First Class Magistrate in the Nasik Sub-Division with having committed an offence under sections 352, 504 and 506 of the Indian Penal Code. The trial commenced on April 16, 1924, when one witness for the prosecution was examined. On April 25, two more witnesses for the prosecution were examined and then the accused was questioned generally. To the question whether he wished to further cross-examine the prosecution witnesses, he said “Yes”. He was also asked if he had any witnesses, and he gave the names of certain persons he wished to call as witnesses for the defence. On the same day a charge was framed under the three sections above-mentioned. On May 2, the prosecution witnesses who had previously been examined were cross-examined. The accused was not questioned further and he entered on his defence. One witness for the defence was examined and cross-examined. On May 20, 1924, another witness for the defence was examined, and on May 21, 1924, judgment was delivered convicting the accused and sentencing him to pay a fine of Rs. 50, or to suffer two weeks’ rigorous imprisonment. He, thereupon, made an application to this Court in revision, and the fourth ground on which he complained of the proceedings in the lower Court was as follows:

“That the learned Magistrate has erred in law in not getting an explanation from the accused as to what was deposed against him by the prosecution witnesses in their cross-examination and this omission to examine the accused vitiates the trial and conviction.”

Now the procedure to be followed in warrant cases is prescribed by Chapter XVI of the Criminal Procedure Code. Under section 254, at any previous stage of the case even before the whole of the evidence for the prosecution has been taken, the Magistrate is competent to frame a charge against the accused. Under section 255 (1), the charge will then be read and explained to the accused, and he shall be asked whether he pleads guilty or has any defence to make, and under section 256 if the accused claims to be tried he shall be required to state at the commencement of the next hearing of the case, or if the Magistrate for reasons to be recorded in writing so thinks fit forthwith, ask the accused whether he wishes to cross-examine any, and if so, which, of the witnesses for the prosecution whose evidence has been taken. If he says he does so wish, the witnesses named by him shall be re-called and, after cross-examination and re-examination (if any), they shall be discharged. The evidence of any remaining witnesses for the prosecution shall next be taken, and, after cross-examination and re-examination (if any) they also shall be discharged. The accused shall then be called upon to enter upon his defence and produce his evidence.

It is, therefore, contemplated by these provisions that the Magistrate can frame a charge although the prosecution case is not complete, and if he does so, and the accused claims to be tried, he is bound to ask the accused whether he wishes to cross-examine any of the prosecution witnesses who have already been called. If the accused states that he wants to cross-examine any of those witnesses, those witnesses must be brought back to the Court so that they may be cross-examined.

It is also contemplated that in addition to such cross-examination, further witnesses may be examined for the prosecution, and if such further witnesses are produced, they shall be examined, cross-examined and re-examined. Then the prosecution case is complete and the accused shall be called upon to enter upon his defence and produce his evidence.

Section 342 deals with the power of Magistrate to examine the accused. The Court may, at any stage of any inquiry or trial, without previously warning the accused, put such questions to him as the Court considers necessary for the purpose of enabling the accused to explain any circumstances appearing in the evidence against him. That power is discretionary. In addition the Court is bound, for the purpose aforesaid, to question the accused generally on the case after the witnesses for the prosecution have been examined and before he is called on for his defence. In my opinion there can be no difference in meaning between the words "called upon to enter upon his defence" and "called on for his defence". It has been contended that the examination of the accused generally on the case as required by section 342 can legally take place so as to fulfil the conditions of the section any time before the defence commences, so that in this case where the accused was examined after the two prosecution witnesses had been examined, but before the charge was framed, before the prosecution witnesses had been cross-examined, before any other witnesses the prosecution might wish to call had been called, there was an examination according to the provision of section 342. In support of that contention we have been referred to the Full Bench decision of the Madras High Court in *Varisai Rawther v. King-Emperor* (1). An opposite view has been taken by the High Court of Calcutta in *Dibakanta Chatterjee v. Gour Gopal Mukherjee* (2) which was decided some months after the Full Bench decision of the Madras High Court. Unfortunately the Madras decision was not either reported at the time when the Calcutta case was decided, or was not placed before the Court. However that may be, the point seems to be an extremely simple one. The Code intends that the accused shall be given an opportunity of explaining any circumstances appearing in the evidence against him. That must mean the whole of the evidence against him, and any examination under section 342 before that evidence is closed cannot possibly fulfil the conditions of the section.

With respect I entirely agree with the opinion of Rankin, J., expressed in *Dibakanta Chatterjee v. Gour Gopal Mukherjee* (2) that the word "examined" in section 342 must include cross-examination and re-examination and cannot be taken as including only those answers which a witness gives to questions put to him in the first instance by the prosecuting counsel or pleader. In my opinion the stage in the trial prescribed by section 342 when the accused has to be questioned generally on the case for the prosecution is after the prosecution evidence is complete and before he is called upon to enter on his defence. The obligation imposed by section 256 on the Magistrate to ask the accused whether he wishes to cross-examine the prosecution witnesses is quite distinct from the obligation imposed by section 342 to question the accused generally for the purposes mentioned therein.

In my opinion, therefore, the Magistrate has not complied with the provisions of section 342, Criminal Procedure Code. It has been previously decided by this Court that the omission to examine the accused under that section vitiates the trial, and the same result must follow if the accused has been examined before the stage in the trial prescribed by the section has been reached. We could make the order, as was made in the case I have referred to in the Calcutta High Court, directing the Magistrate to resume the trial from the point where he fell into error. But considering the particular circumstances of the case, the fact that if we do so, we would have to send back the accused for trial for the third time, and the fact that the offence is not a very serious one, we think there is no reason why the accused should be put on his trial again. We, therefore, set aside the conviction and direct the fine and the process fee, if paid, to be refunded.

Crump, J.:—I agree with the order proposed and the grounds upon which it is based. The question for our decision is the interpretation of clause (1) of section 342, Criminal Procedure Code. That section lays upon the Court the duty of examining the accused person generally for the purpose of giving him an opportunity of explaining any circumstances appearing in the evidence against him, and the point which we have to decide is up to what stage of the case does that duty laid upon the Court persist. Now the section says

(1) 1923 Mad. 609 = 46 Mad. 449 = 44 M.L.J. 567 = 17 L.W. 722 = 32 M.L.J. 385 = (1923) M.W.N. 477 = 24 Cr. L.J. 547 (F.B.).

(2) 1923 Cal. 727 = 50 Cal. 939 = 27 C.W.N. 743 = 25 Cr. L.J. 27.

that such examination shall for the purpose aforesaid be made after the witnesses for the prosecution have been examined and before the accused is called on for his defence. That examination must, therefore, come immediately between the two stages so indicated. It seems, therefore, to me that up to the stage indicated by the words "before the accused is called on for his defence," it is obligatory on the Magistrate to question the accused as regards any circumstances appearing against him, and, therefore, as regards any evidence which may have been recorded up to that point.

Therefore we have to determine when that stage is reached, and if reference is made to section 256, I think, no doubt can be felt that that stage is not reached until all which is prescribed by that section has been completed. If then under that section the accused exercises his option to recall the witnesses or any of the witnesses for the prosecution for cross-examination, he has not reached the stage which the section defines by the words "the accused shall then be called upon to enter upon his defence and produce his evidence." In my opinion it is impossible to make any distinction between the words so used in section 256 and similar words "before the accused is called upon for his defence in section 342.

If that is the correct view of the law, it follows that in the present case the Magistrate by failing to question the accused, after he had exercised his option to cross-examine the prosecution witnesses, failed to discharge the duty which the law has laid upon him by the imperative words of section 342. Now this Court has held that a failure to comply with the provisions of section 342 is an error which vitiates the proceedings, and it would, therefore follow that the conviction could not be sustained. That being my view of the scope of the relevant sections. I concur in holding that the trial is bad.

Conviction set aside.

1925 Bombay 173.

SHAH, A.C.J. AND KINCAID, J.

Forbes Forbes Campbell & Co.—Defendants-Applicants.

v.

Official Assignee, Bombay—Plaintiff-Opponent.

Civil Extraordinary Application No. 289 of 1923, decided on 18th August, 1924, against the decision of Bombay Court of Small Causes.

Negotiable Instruments Act, Ss. 50 and 13—Hundi payable to payee or bearer—Endorsement by payee in favour of a named person—Hundi ceases to be payable to bearer.

A Hundi drawn in favour of a payee or bearer in the first instance but endorsed by the payee to a named person, ceases to be a hundi payable to bearer. It is payable only to the named person.

S. 50 is not limited to negotiable instruments payable to order. It applies to any negotiable instrument whether it is payable in the first instance to order or to bearer. The illustrations to the section make it clear that indorsements made on instruments payable to bearer can have a restrictive effect upon its negotiability. [P. 175, C. 1.]

Campbell, instructed by Crawford Bailey & Co.—for the Applicants.

P. B. Shingne—for the Respondent.

Shah, Ag. C.J.:—This is an application under section 115, Civil Procedure Code. It arises out of a suit filed by the Official Assignee, in whom the estate of Raoji Nanchand, who was adjudicated an insolvent, was vested in respect of a hundi. The hundi in question was drawn in favour of one Ramdas Keshavji or bearer on Forbes Forbes Campbell & Co., Ltd. That hundi was indorsed on the back as "sold by Ramdas Keshavji to Raoji Nanchand." We are not concerned with the indorsement on the face of the hundi at the top. The hundi was presented by the Munim of one Madhavdas Keshavji to Forbes Forbes Campbell & Co., Ltd. It was treated as a hundi payable to bearer and the money was paid to Madhavdas Keshavji's Munim. This Madhavdas Keshavji was a third person in whose favour there is no indorsement on the hundi. The Official Assignee claimed the amount of this hundi as belonging to the insolvent Raoji Nanchand. The learned Chief Judge of the Small Causes Court, Bombay, who heard the suit, passed a decree in favour of the plaintiff, holding that by the last indorsement, which was

not an indorsement in blank, but an indorsement in full, the hundi ceased to be payable to the bearer, and that at the time of the presentation it was payable in law only to Raoji Nanchand or his order. There was an application to the Full Court, and the Full Court also came to the same conclusion and discharged the rule which was granted by that Court.

An application was made to that Court to make a reference to this Court under section 69 of the Presidency Small Cause Courts Act; but the learned Judges constituting the Full Court apparently did not entertain any reasonable doubt as to the point and decided it against the defendants.

The defendants have now applied to this Court under our extraordinary jurisdiction, and have also prayed in the alternative that this application may be treated as an application under section 45 of the Specific Relief Act for directing the Full Court to refer the case to this Court under section 69 of the Presidency Small Cause Courts Act. The alternative prayer is clearly one which cannot be entertained by this Court. An application under section 45 of the Specific Relief Act would have to be made, not to this Court, but to a Court on the Original Side, and I do not desire to say anything as to whether an application under section 45 of the Specific Relief Act could properly be made in a case of this kind.

We have to consider this application as falling under section 115 of the Code. The first difficulty under that section is whether the point arising in the application is of such a nature as to bring it within the scope of section 115. The question involved is purely one of law. It depends upon the interpretation of the provisions of the Negotiable Instruments Act; and I am by no means satisfied that the case falls within the scope of section 115. Having regard to the importance of the point involved in the case, and to the fact that it depends entirely upon the interpretation of the sections of the Negotiable Instruments Act, we have heard the parties on the point. Without expressing any final opinion as to whether a point such as is involved in this case can be entertained under section 115 or not, we consider it desirable under the circumstances to decide the point on the merits.

The argument on behalf of the defendants is that under section 82, clause (c) of the

Negotiable Instruments Act, the defendants are discharged if the instrument is payable to bearer, or has been indorsed in blank, and if the acceptor makes payment in due course of the amount due thereon. In the present case it is urged that the amount has been paid in due course, that the instrument was payable to bearer in the first instance and continued to be payable to bearer in spite of the indorsement and that, therefore, they were discharged. It is not disputed in the present case, and it cannot be disputed, that under the hundi the amount was payable to bearer in the first instance. The hundi was drawn in favour of Ramdas Keshavji or bearer. In the trial Court and before the Full Court apparently reliance had been placed upon explanation (ii) to section 13 as now amended by Act VIII of 1919, as indicating that the real character of the instrument was determined by the only or last indorsement on the instrument. In the present case the last and only indorsement is not in blank. Section 13, however, defines what a "negotiable instrument" is, and it is clear that the hundi in question as drawn was a negotiable instrument within the meaning of the section, and continued to be negotiable, after the indorsement in question, according to explanation (i) of section 13 as amended in 1919.

The contention on behalf of the defendants is that if it is once a negotiable instrument payable to bearer, by no subsequent indorsement its character of being payable to bearer can be altered. In support of this proposition no express authority has been cited. But reference has been made to section 54 of the Negotiable Instruments Act as indicating that if the legislature thought that such alteration in the nature of the instrument can be effected, the legislature would have made express provision to that effect, as is done with reference to cheques payable to order. It is further urged that section 50 of the Negotiable Instruments Act refers only to negotiable instruments which are in the first instance made payable to order.

Section 50 of the Act appears to me to afford a complete answer to these contentions. There is nothing in the words of the section to justify the contention that it is limited to negotiable instruments payable to order. It applies to any negotiable instrument whether it is payable in the first instance to order or to bearer, and in

fact the illustrations to the section make it clear that indorsements made on instruments payable to bearer can have a restrictive effect upon its negotiability. The learned Counsel, realising the effect of these illustrations, has argued that the illustrations are really outside the scope of the section, and must be rejected as being repugnant to the section. I am quite unable to accept this argument. The illustrations do not appear to be at all repugnant to the words of the section, and they fall within the scope of the section. Illustration (e) to section 50 makes it clear that the character of the instrument before us, which was payable to bearer in the first instance, has been altered by the only indorsement in the present case in this sense that thereafter it became negotiable at the instance of Raoji Nanchand.

We are not concerned with the question whether it would be payable to Raoji Nanchand or his order, though under section 13, explanation (i), it would be payable to his order. It is not the defendant's case that the money was paid to Raoji Nanchand's order. The character of the instrument, which was payable to bearer in the first instance, has been effectively altered by the subsequent indorsement, and under section 50 of the Negotiable Instruments Act it can be so altered. The conclusion reached by the trial Court and the Full Court is right. We discharge the rule with costs.

Rule discharged.

1925 Bombay 175.

MARTEN AND FAWCETT, JJ.

Gaurishankar Bhaishankar Thakor—Appellant

v.

Madhavsangji Jesangji—Respondent.

S. A. No. 186 of 1923, decided on 29th August, 1924 from the decision of the Assistant Judge, Ahmedabad.

Broach and Kaira Incumbered Estates Act (Bom. Act XXI of 1881), S. 28—Estate taken under management—Disability continues even in the case of successor of the Thakor.

The disability contained in S. 28 applies not only to the Thakor during whose life-time the estate was taken under management, but it extends to his successor also, who, however, is allowed to incur unsecured debts. [P. 176, O. 1.]

H. C. Coyajee and H. V. Divatia—for the Appellant.

G. N. Thakor and R. J. Thakor—for the Respondent.

Marten, J.:—The short point in this case is whether Madhavsangji, the deceased defendant, was a Thakor within the meaning of section 28 of the Broach and Kaira Incumbered Estates Act, 1881 (Bom. Act XXI of 1881) and accordingly prevented from mortgaging beyond his own life except with the sanction of the Commissioner. It is said that he is not such a Thakor because the estate in question was taken under management in the lifetime of his brother Shivsangjee, and that accordingly he (Madhavsangji) is not under the same disabilities as his deceased brother would undoubtedly have been under section 28 on restoration to possession of his property.

Now in this case it is stated that there was a liquidation scheme under section 20 and that the management was afterwards terminated under section 26. Accordingly under the provisions of that section not only did the management terminate, but the owner was also restored to the possession and enjoyment of the property under management. Then the next section 27 provides for what is to happen if the original debtor dies after the publication of the order of management and before the management has been terminated. That section applies to the present case. In that case the management continues, and the successor becomes subject to the same disabilities as his predecessor under section 9 (b) and (c), viz., that he cannot mortgage, charge, lease or alienate the property under management, or grant valid receipts for the rents and profits. But on the other hand he is not debarred like his predecessor under sub-section (a) of that section from entering into any contract involving him in pecuniary liability.

Stopping there, what the Act provides is that pending management a successor may contract unsecured debts, but cannot create any charge on the property. And there is one good reason for this, viz., that under the concluding words of section 9 it is for the manager (who is usually the Talukdari Settlement Officer) to mortgage or charge a property so long as the management continues.

Next, when we come to section 28, which deals with the position when the management is ended, it will be seen that the words there are "a Thakur," and that accordingly the language is changed from that in section 26 which refers to "the owner" and from that in section 27 which refers to "the debtor."

In my opinion in the present case Madhavsangji is a Thakor who within the meaning of section 28 has been restored under section 26 to the "possession of property." If the legislature had intended to confine the operation of section 28 to the original debtor (*e.g.* Shivsangjee), I think that instead of the words "a thakur" in section 28 the legislature would have used the words "the debtor" as in section 27. And I can see very good reasons why the successor should be prohibited from mortgaging beyond his own life, although he may be allowed to incur unsecured debts. After all in the case now under consideration the estate has already been under management once, and it may well have been thought prudent by the legislature that in such a case the immediate successor should be under the disability of mortgaging beyond his own life, at any rate in cases where the estate is still under management when he succeeds to it.

As regards the unsecured debts the position is different. No charge would be created on the estate, and supposing the successor plunged wildly into debt after the management was restored to him, then it would be quite practicable to have the estate once more restored to management under the earlier sections of the Act. So that it cannot be effectively argued against the above construction of the Act that it would still leave an unrestricted power of creating unsecured debts, all of which a creditor could enforce to the full by attaching the property and so indirectly effecting the very object that a secured mortgage would do.

Under these circumstances I think the judgment of the lower Court is correct, and that the appeal should be dismissed with costs.

Fawcett, J. :—I agree. The meaning of section 28 seems to me to be too clear to permit of the ingenious argument which has been put forward before us by Mr. Coyajee for the appellant. There is no ambiguity to justify the Court in going outside the plain meaning of the words in

their natural sense, and in trying to ascertain the intention of the legislature from other provisions of the Act. There is also a clear decision of this Court in *Parshottam v. Chatrasangji* (1) where a similar contention was overruled without hearing the respondent.

Appeal dismissed.

(1) (1917) 41 Bom. 546=40 I.C. 1002=19 Bom. L.R. 545.

* 1925 Bombay 176

SHAH, AG.C.J. AND KINCAID, J.

Bala Ramchandra Gandbavle—Plaintiff-Appellant

v.

Daulu Rama Kirratsingh—Defendant-Respondent.

S. As. Nos. 196 and 234 of 1923, decided on 25th August, 1924, from the decision of Sub-Judge, Satara, in Appeal No. 329 of 1921.

* *Transfer of Property Act, S. 52*—*Transfer of suit property by person who was subsequently brought on record as legal representative of original defendant is not void.*

In 1910 V made a gift of his land to his daughter R. The plaintiff sued V in 1914 to recover possession of the land. V died pending the suit and R was brought on the record as V's legal representative. But before she was so brought, she had sold the land to defendants. The plaintiff thereupon sued the defendant to recover possession of the land from them on the ground that the sale was affected by the doctrine of *lis pendens*.

Held, that R was not a party to the suit of 1914 in her own right and the sale to defendants took place before she was brought on record and therefore the doctrine of *lis pendens* did not apply. [P. 177, C. 2.]

H. P. Mandavle—for the Appellant.

A. G. Desai—for the Respondent.

Shah, Ag.C.J. :—These are two appeals arising out of two suits filed by the plaintiff in respect of certain land and a house. As regards Appeal No. 196 of 1923 which relates to the house both Courts have found that the plaintiff's title is not proved and that his possession within twelve years prior to the date of the suit is not proved. It is clear, therefore that that appeal must fail. We confirm the decree of the lower appellate Court and dismiss the appeal with costs.

As regards the land the facts are these. Vithu made a gift of the land in 1910 by a registered document, and Vithu's

daughter Radha was in possession of this property when, in January 1914, the present plaintiff filed a suit against Vithu for possession of this very land. Vithu died during the pendency of the suit, and Radha was brought on the record as the legal representative of Vithu. But before she was brought on the record, she sold the land to defendant No. 1. In that suit Bai Radha did not appear to contest the suit as the legal representative of Vithu with the result that an *ex parte* decree was passed in favour of the plaintiff and against Vithu's legal representative in respect of this very land on November 30, 1915. The possession of the land was with the defendants under the alienation in their favour by Radha. The plaintiff apparently sought to get possession of this land under the decree in the suit of 1914, but he was resisted by the present defendants. On the application of the defendants his effort to get possession failed. He then filed the present suit for possession of the land against the defendants.

The defendants in this suit claimed a title to this land through Bai Radha who acquired title to it under the gift made by her father in 1910. The defendants also claimed to have been in possession of this land for over twelve years in their own right adversely to the plaintiff. Both the Court have found against the plaintiff on the allegation that this land was given to the mother and sister of the plaintiff and Vithu for maintenance. That allegation of the plaintiff must, therefore, be left out of consideration. It is found that Vithu was the owner of this land, that he made a gift of it in 1910 and that the defendants have been in possession through Bai Radha of this land. The finding of the lower appellate Court is that the plaintiff has not proved his possession within twelve years prior to the date of the suit, and even if the lower Courts were not satisfied that the defendants had been in possession for over twelve years adversely to the plaintiff, on this finding it is clear that the plaintiff cannot succeed.

It is urged on behalf of the plaintiff before us, as it was urged in the lower appellate Court, that in virtue of the decree in Suit No. 33 of 1914, his title to this land is established against Radha, and as the alienation by Radha in favour of the present defendants was during the pendency of the suit, the right of the plaintiff

under the decree in that suit is not affected under section 52 of the Transfer of Property Act. But when the facts are clearly understood, it follows necessarily that the defendants do not seek in any way to prejudice the right of the plaintiff against Vithu which he got under the decree against his legal representative. But what they claim is the title which came into existence long prior to this suit, namely, the title under the gift by Vithu to his daughter Radha. The defendants really assert that Vithu had no title to the land at the date of the suit. In the suit filed against him in 1911, Radha was joined only as the legal representative of Vithu; and the question as to whether Vithu's title had passed on to Radha effectively before that suit was filed was not in question in that suit nor was it considered in that suit. It is quite clear that the doctrine of *lis pendens*, as stated in section 52 of the Transfer of Property Act, cannot apply to these facts. All that the section provides is that property cannot be transferred or otherwise dealt with by any party to the suit or proceedings so as to affect the rights of any other party thereto under any decree which may be made therein. In the first place, in the present case, it is difficult to say that the alienation was by any party to the suit. It was an alienation by Radha in her own right, and she was not a party to that suit in her own right. Even assuming that Radha having been joined as the legal representative of Vithu she was party to that suit, it is clear under section 52 that the right of the plaintiff under that decree is not affected on account of the transfer by Bai Radha. The transfer that affects the plaintiff's right under the decree is the gift before the suit of 1914, and the transfer by Radha after the suit was filed is independent of the title of Vithu at the date of the suit. This appeal, therefore, fails, and must be dismissed with costs.

Appeal dismissed.

1925 Bombay 178.

MARTEN AND FAWCETT, JJ.

Mahableshwar Devershetti — Plaintiff-Appellant.

v.

Badku Venka Naij and others—Defendants-Respondents.

S. A. No. 290 of 1923, decided on 28th August, 1924, from the decision of the District Judge, Kanara, in Appeal No. 24 of 1922.

Land tenure—Nadgi tenure—Neglect of tenant to cultivate lands and rebuild the fallen house justifies his eviction.

If a *Nadgi* tenure-holder neglects to cultivate the land, allows the hut to go into disrepair, carries away some of the building materials himself, and allows the rest to be stolen by others, he is liable to be evicted from his holding at the instance of the landlord. [P. 181, C. 1.]

No definite rule can be laid down that the overlord in *Nadgi* tenure has to bear the expense of all improvements. [P. 179, C. 1.]

S. V. Palekar—for the Appellant.

G. P. Murdeshwar—for the Respondents.

Fawcett, J.:—This appeal relates to what is known as *Nadgi* tenure in the District of Kanara. The defendants are *Nadgi* tenants of the land in suit. The plaintiff is its owner. The plaintiff sued to recover possession of this land with mesne profits and damages. He alleged that the defendants had failed to comply with the condition, on which they were granted the land, of maintaining it in proper condition as a garden, and that therefore he was entitled to recover the land owing to forfeiture of tenancy by breach of the condition. Defendants Nos. 1 and 2, who have alone defended the suit contended that they had not neglected the land, and that such neglect as there had been in the last one or two years was not their fault; a hut that was on the land had fallen down, and although the plaintiff had been asked to erect a new hut, he had not done so, with the result that the defendants could not stay on the land and properly look after it. They also denied the plaintiff's right to recover mesne profits and damages.

The main issue raised in the case was whether the plaintiff was bound to provide a house for the residence of the tenants, or whether the tenants should themselves provide it. With this is to be read the third issue in the trial Court: "Have

defendants committed breach of duties as alleged by the plaintiff." Both those issues were answered in favour of the plaintiff by the learned Subordinate Judge. He held that the land was certainly in a most neglected state. A Commissioner was appointed to report about it, and found that cattle were grazing in the land which was left uncared for. Admittedly the defendants were living at a distance of about a mile from the land and for three years nobody had been staying upon it. The defendants admitted that the land was not in good order, at any rate for a year and a half prior to the trial. There was no compound wall round the land to keep out cattle, nor any hedge or fence to supplement the small portion of wall that there was on one side of the land. The trees existing on the land were admittedly at least forty years old, and no new trees had been planted, although there was spare space for doing so.

In regard to the question about the hut, the Subordinate Judge accepted the testimony of the defendants' witnesses that "when a house falls down, the landlord has to supply materials and the tenant is to build the house." But in this case, according to defendant No. 2's own admission, he had taken some of the materials from the old house and allowed others to steal the remainder. Accordingly he held that materials were available to the defendants for building a new hut, and that the plaintiff was not liable to build it for the defendants. In the result he passed a decree awarding the plaintiff possession of the land, Rs. 30 for damages on account of the defendants having neglected to keep the land in good order, and Rs. 50 for the plaintiff's share of the produce of the land for one year before suit. He also gave the plaintiff their costs of the suit.

Defendants Nos. 1 and 2, appealed to the District Judge, who held that the garden in question had certainly been neglected. He says in his judgment:—"It is common ground that the house has been allowed to collapse and that the rafters have been stolen away. It is hardly disputed that there is no fence about the garden, and it is admitted that there is no tree of less than forty years of age." But he held that under the *Nadgi* tenure, it was the business of the plaintiff, being the overlord, to bear the expense of planting

trees, keeping up fences, and other things necessary for improving the land; while the defendants as tenants, were responsible for performing the manual work which would be entailed. Accordingly, although the property had suffered from neglect, he held that the neglect was as much the neglect of the plaintiff himself as the neglect of the tenants, and that the plaintiff was not entitled to terminate the tenancy on the ground of breach of condition and to get immediate possession. The decree of the lower Court was accordingly reversed and both the parties were ordered to bear their own costs throughout.

The plaintiff has come here in second appeal on the main ground that the District Judge has misunderstood the nature of the *Nadgi* tenure, and that having found that the property had suffered from neglect, he should have given the relief asked for against the defendants. It appears to me that there are no sufficient grounds for laying down as a definite rule that the overlord in *Nadgi* tenure has to bear the expense of all improvements, in the way the District Judge has stated. So far as the present suit is concerned, no evidence has been adduced which would justify a finding to that extent. It is quite clear that the main dispute between the parties was in regard to the hut which had fallen down, and that was the only expense which the defendants alleged the plaintiff had to bear and which was put in issue on the ground that the plaintiff not having built a new hut, the defendants could not be held responsible for not keeping the garden in a proper state. So far as any other expenses are concerned, there is no evidence which would justify this Court in finding who was liable for them and holding for instance that the expense of building a compound wall should necessarily fall upon the plaintiff.

In this connection I may refer to the litigation which came before this Court in S.A. No. 830 of 1907 and related to the condition of this *Nadgi* tenure, and where the District Judge, Mr. Boyd, has laid down the main condition of the tenancy in a form that is generally referred to as authoritative in a case of this kind. In the suit out of which that litigation arose, the judgment of the Subordinate Judge shows that the plaintiff's contention was that the tenants (the defendants in that suit) ought to have kept the

land in proper condition by erecting a compound wall and planting trees. They had, however, not done this, and hence it was contended they had lost their *Nadgi* right. No contention was apparently raised in that case that the landlord was liable for the expense of keeping up a compound wall, or even the expense of planting new trees. The District Judge, Mr. Boyd, in his judgment, does not mention this as a main condition of the tenancy. He says: "It is undoubtedly a permanent tenancy, but with a condition attached to it. The condition is that the tenant shall water and manure the trees, repair the fence or wall round the garden and plant new trees from time to time so that the garden shall always have in it about as many trees as it can contain with profit to those who enjoy its produce." He held that a breach of this main condition made the tenancy liable to forfeiture at the will of the landlord, and this view was upheld by this Court in second appeal.

In the judgment of the Court given by Chief Justice Sir Basil Scott and Heaton, J., it is said: "The defendants were *Nadgi* tenants of the plaintiffs. There was no dispute in the Courts below as to condition of the *Nadgi* tenure. It is a condition of the tenure that the tenant should cultivate garden land. It is found as a fact in both the Courts that the defendants have broken the condition by neglecting the cultivation and according to the custom of the tenure the landlord on breach of the condition acquires a right to oust the tenant." They held that there had been a clear breach of condition justifying forfeiture, and that the plaintiffs were entitled to possession.

In view of this judgment, it requires greater authority than is now available in the materials before us before it can be laid down as a condition of *Nadgi* tenancy that the landlord necessarily has to bear the expenses of keeping the land in proper condition. No doubt the description of the tenure given in the Bombay Gazetteer, Vol. XV, Part 11, relating to the District of Kanara, at p 186 includes a statement that "an occupant bears the expense of planting trees and the tenant bears the expenses of rearing them." That is an authority which must be given due weight, but it seems to me it is not necessarily conclusive.

The same point as regards the cost of planting trees was one that arose in

another suit from this same taluka of Honavar; *Bibi Khatija Shamsuddin Kavada v. Ram Rao Santayya Chikarmane Honavar* (1). The District Judge relied upon this passage from the Gazetteer in the appeal before him. But in this Court the judgment given by the learned Acting Chief Justice and myself on June 30, 1924, left the point open, as it was unnecessary to decide it, except in so far as it was conceded before us that, when plants are sown for the first time, they have to be paid for by the landlord.

Therefore, in deciding this appeal on the evidence before us as regards the liability of the plaintiff to supply materials of a residence required for persons looking after the land, I think that, having regard to the defendants' admission as to their removing materials and allowing others to steal the rest, the view of the Subordinate Judge that there was no obligation on the plaintiff to supply other materials is correct. It is a case where there has been conduct on the part of the tenants which is entirely against their acting *bona fide* and reasonably, and it is not right in those circumstances to hold that the plaintiff is as much to blame for the neglect of the garden after the house had fallen down as the defendant.

But the case against the defendant goes further than that. It is clear from the findings of both the Courts that there had been a great neglect of this garden even prior to the falling down of the hut, and I think that the case is not one where it can properly be held that the property has suffered from the neglect of the plaintiff as much as from the neglect of the defendants. That is a finding of the learned District Judge which, as I have already shown, is based on a view of this *Nadgi* tenure, that is not supported by the evidence in the case or authority and is not binding on us.

In regard to the question whether any equitable relief against the forfeiture should be allowed to the defendant, it is shown by Mr. Boyd's judgment, to which I have already referred, that in 1907 he found only one case in which a decree allowing the tenants a chance of relieving themselves against forfeiture had been passed, *viz.*, an appeal of 1883. In the case before him Mr. Boyd held that the defendants by their conduct were not entitled to any such relief.

Such preliminary decrees have, however, no doubt since been frequently passed, and in the present case we have been asked to give the defendants a further chance of complying with the condition of their tenancy, but in view of all the circumstances I do not think this is a case calling for any such indulgence. The defendants' conduct in misappropriating the materials of the hut and neglecting the land for several years goes strongly against this.

Consequently it seems to me that, as was held by this Court in S. A. No. 830 of 1907 the plaintiff was entitled to a decree such as the Subordinate Judge passed in his favour. I would, therefore, allow the appeal, restore the judgment of the Subordinate Judge, and order the defendants to pay the costs of the plaintiff in this Court and the lower appellate Court.

Marten, J.—I agree. The learned District Judge cites no authority in support of his proposition as to the conditions of *Nadgi* tenure, nor is there any real support for it from the evidence in the case. On the other hand, there is an unreported case in this appellate Court, S. A. No. 830 of 1907, which my brother Fawcett has referred to. That case contains no trace of the obligations on the part of the landlord, which the lower appellate Court in the present case thought was a part of the conditions of this particular tenure.

As regards the other unreported case of *Bibi Khatija Shamsuddin Kavada v. Ramrao Santayya Chikarmane Honavar* (1) the question whether, generally speaking, a landlord has to provide or pay for new plants in the case of a *Nadgi* tenancy was expressly left open. In that particular case it would appear that the portion of the garden in dispute had never been planted at all. Consequently the plants had to be planted for the first time in the history of that portion of the garden, and it was conceded by the parties that under those circumstances the landlord had to pay for the plants. In the case now before us it is clear that the garden is an old one, and accordingly it differs essentially from *Bibi Khatija Shamsuddin Kavada v. Ramrao Santayya Chikarmane Honavar* (1).

But in the view I take it is unnecessary in the present case to decide all the precise conditions of this *Nadgi* tenure. It is sufficient to say that one of those conditions is that a tenant should properly cultivate the land. Here it is clear on the evidence that

(1) S. A. No. 604 of 1922 (decided on 30-6-1924 by Shah, Ag. C. J. and Fawcett, J.)

the tenant has seriously neglected the cultivation of the garden land; and in our judgment this neglect cannot be put down to the fault of the landlord.

Then as regards the hut, inasmuch as the defendant himself has wrongfully appropriated the old building materials, such as the rafters, it hardly lies in his mouth to complain that the landlord has not furnished him with some new building materials.

I agree, therefore, that the judgment of the learned District Judge was erroneous in the view of the law which he took, and of the legal inferences to be drawn from the evidence before him. I accordingly agree that the appeal must be allowed.

I will only add, speaking for myself, that I hope that if another case involving the conditions of Nadgi tenure should be brought in the lower Court, care should be taken that proper evidence is called as to the conditions of this tenure. At present I think it cannot be considered that all the conditions of this tenure are established by conclusive authority as part of the settled law of this Province.

Appeal allowed.

**** 1925 Bombay 181.**

SHAH, AG. C.J. AND KINCAID, J.

Krishnaji Babaji Haval—Defendant-Appellant.

v.

Sangappa Murigappa Wangi—Plaintiff-Respondent.

S. A. No. 497 of 1923, decided on 25th August, 1924, from the decision of the District-Judge, Belgaum, in Appeal No. 268 of 1922.

**** (a) Civ. Pro. Code, S. 11, Expl. IV—Might and ought—Suit for specific performance of a contract of sale—Relief as to possession need not be asked—Specific Relief Act, S. 42.**

In a suit for specific performance of a contract of sale though a claim for possession might be made it is not obligatory upon the plaintiff to make such a claim. Under S. 54 of the Transfer of Property Act, the contract for sale of immoveable property of itself creates no interest or charge upon the immoveable property, and until the claim for specific performance is decreed in favour of the plaintiff it cannot be said that he is entitled to possession, though for the sake of convenience, to avoid multiplicity of suits, it might be open to the plaintiff to make a claim for possession in the same suit. [P. 182, C. 1.]

**** (b) Civ. Pro. Code, S. 11—Expl. V—Relief asked for in plaint but not referred to in judgment—Decision as to that relief found to be unnecessary—No res judicata.**

Where in a suit for specific performance of a contract of sale of land, relief as to possession was prayed for in the plaint but there was no reference to it in the judgment, *held* that that relief may be taken to have been refused but the matter was not heard and finally decided within S. 11 and hence no *res judicata* especially when it was found that there was ground to hold that a decision on that relief was not considered to be necessary in that suit. [P. 183, C. 1.]

J. G. Rele—for the Appellant.

G. S. Mulgaonkar—for the Respondent.

Shah, Ag. C.J.—The facts which have given rise to this appeal are briefly these. On October 20, 1918, the present defendants Nos. 3 and 4 agreed to sell the house in question to the present plaintiff for Rs. 850. On October 25, 1918, they in fact sold it to the present defendant No. 1 for Rs. 900. The plaintiff filed Suit No. 358 of 1918 against the present defendant No. 1 and present defendants Nos. 3 and 4 for specific performance and damages arising out of the breach of the said contract dated October 20, 1918. It appears that the plaintiff made a claim for possession of the property also. The judgment in that suit shows that the principal point raised was whether defendant No. 1 had notice of the contract between the plaintiff and the owners of the house. It was found that defendant No. 1 bought from the owners with notice of the previous contract with the plaintiff and in the result the following decree was passed:—"On payment of Rs. 825 by plaintiff, defendant No. 3 must execute a conveyance of the suit shop to plaintiff."

We are informed that there was an appeal from this judgment, and there was also a second appeal, but the proceedings relating to the appeal and the second appeal have not been put in, and it may be taken that the decree passed in the suit, to which we have referred, was affirmed.

Apparently after this the plaintiff obtained possession of a part of the shop in question, and the present suit was filed by the plaintiff in December 1920 for possession of the rest of the shop from defendant No. 1, who was in possession, and defendants Nos. 2, 3 and 4 were joined as parties, defendant No. 2 being a tenant of defendant No. 1, and defendants Nos. 3 and 4 being the original owners of the property.

The defence raised on behalf of defendant No. 1 was that the claim for possession was barred by the provisions of section 11 of the Civil Procedure Code. The trial Court disallowed this contention and passed a decree for possession against defendant No. 1.

Defendant No. 1 appealed to the District Court, but the learned District Judge accepted the conclusion of the trial Court on this point, and confirmed the decree of the trial Court.

In the appeal before us by defendant No. 1, two points have been raised in support of the plea that the present suit is barred by the provisions of section 11 of the Code. First, it was urged that it was obligatory upon the plaintiff to make a claim for possession in the previous suit for specific performance, and quite apart from the question whether a claim was made or not, a second suit for possession on the same contract cannot lie. In support of this argument reliance is placed upon Explanation IV to section 11. This contention, however, is opposed to the decision of this Court in *Nathu v. Budhu* (1). It is true that a different view has been taken in *Narayana Kavirayan v. Kandasami Goundan* (2). But the correctness of that view has been doubted in *Krishnammal v. Soundaraja Aiyar* (3). It is not necessary to deal with this point at any length. It is enough to point out that the view of this Court in *Nathu v. Budhu* (1) was that though a claim for possession might be made, it was not obligatory upon the plaintiff to make a claim for possession in the suit for specific performance. Apart from decisions, on principle that view appears to be correct. Under section 54 of the Transfer of Property Act, the contract for sale of immoveable property of itself creates no interest or charge upon the immoveable property, and until the claim or specific performance was decreed in favour of the plaintiff it could not be said that he was entitled to possession, though for the sake of convenience, and to avoid multiplicity of suits, it might be open to the plaintiff to make a claim for possession in the same suit.

It is further urged, however, that in the present case a claim for possession was made in fact, and that, under Explanation V to section 11, this relief claimed in the plaint, and not expressly granted by the decree, should be deemed to have been refused for the purposes of section 11. Though there is no reference in the judgment to this claim, it appears from the decree that in the original plaint a claim for possession was made. It must be taken that the claim for possession was refused. Still the question remains whether the question of possession was heard and finally decided within the meaning of section 11. In determining whether the issue relating to possession was heard and finally decided by the Court in Suit No. 358 of 1918, it must be remembered that there is no reference whatever to the claim for possession in the judgment. There is no reference to it even in the summary of the plaint given in the judgment, and from the issues it is quite clear that no attention whatever was paid to this relief. We do not know what happened during the course of the hearing whether by common consent a claim for possession was dropped as being unnecessary in that suit, or whether the trial Court did not say anything with reference to that claim, because it thought that there was no need to deal with that question in that suit. It is clear that, having regard to the view which the trial Court took with regard to the rights of the parties to the decree which it passed with regard to specific performance, that Court could not have meant to refuse the claim for possession finally. Such a conclusion would be obviously inconsistent with the considered conclusion reached by the trial Court with reference to the plaintiff's right to specific performance. In the absence of any indication in the judgment as to how this point was dealt with, if it was dealt with at all, and in the absence of any indication as to whether the parties by any purchase or otherwise practically agreed to leave the question as to possession out of the suit, the only reasonable inference under the circumstances is that it was not considered necessary to deal with the claim as to possession in that suit. That is the only basis upon which the absence of any reference in the judgment or the decree to the claim for possession can be intelligibly explained. It cannot be explained on

(1) (1893) 18 Bom. 537.

(2) (1898) 22 Mad. 24.

(3) (1913) 38 Mad. 698 = 15 M.L.T. 103 = 22 I.C. 91 = (1914) M.W.N. 200 = 1 L.W. 147.

the footing that the matter as to possession was heard and finally decided within the meaning of section 11 of the Code. Though the claim for possession was made in the plaint, and though there is no reference to it in the judgment or the decree, it must be deemed to have been refused; still the claim as to possession cannot be said to have been heard and finally decided in that suit within the meaning of section 11 of the Code. Therefore there is no bar of *res judicata* as suggested by the appellant. The result is that the decree of the lower appellate Court is confirmed and the appeal dismissed with costs.

Appeal dismissed.

1925 Bombay 183.

MARTEN and FAWCETT, JJ.

Chaturbhui Sangji—Defendant-Appellant

v.

Mansukhram Motilal—Plaintiff-Respondent.

S. A. No 670 of 1923, decided on 27th August, 1924, from the decision of the Assistant Judge, Ahmedabad, in Appeal No. 418 of 1921.

(a) *Transfer of Property Act, S. 3*—Purchaser is not expected to enquire into title deeds of adjoining property—Vendor must disclose covenants if any burdening the property sold—*Transfer of Property Act, S. 55.*

A purchaser may be guilty of negligence in not enquiring for the title deeds, or the earlier title of the property which he has contracted to buy. But he cannot be said to be guilty of negligence in not asking for the title deeds of an adjoining property, which *prima facie* he has no right whatever to ask his vendor to produce; as between the vendor and purchaser, it is the vendor who is to disclose to the purchaser any covenant restricting the enjoyment of the property sold. [P. 184, C. 2 and P. 185, C. 2]

(b) *Specific Relief Act, S. 55*—Affirmative covenants—Not to be enforced against assignee—English principles to be applied.

The Court will not enforce against an assignee of a covenantor an affirmative covenant involving the expenditure of money on land, whether such assignee takes with or without notice. In exercise of its discretion as to the grant of a mandatory injunction under S. 55 of the Specific Relief Act the Court would have regard to principles laid down by the Courts in England in this connection. [P. 185 C. 2 and P. 187, C. 1.]

(c) *Transfer of Property Act, S. 40*—Affirmative covenants.

Quære—Whether S. 40 applies to affirmative covenants involving expenditure of money? [P. 185, C. 2.]

G. S. Rao—for the Appellant.

P. B. Shingne—for the Respondent.

Marten, J.—This is a second appeal by defendant No. 3 against the judgments of the two lower Courts in favour of the plaintiff. Para (a) of the judgment was a mandatory injunction with reference to the property D of defendants Nos. 1 and 2. They have not appealed, and I need not therefore for the moment consider their case. Para (b) was a mandatory injunction against defendant No. 3 to block up a door on the western side of his house E, and also in effect to alter the roof of his house by making it all slope towards the east instead of partly to the west and partly to the east as theretofore. Para. (c) was an injunction to restrain all the defendants from entering the plaintiff's chowk or from taking any cattle there. What the plaintiff claims to be his chowk is shown in to suit plan. It abuts on the property E of defendant No. 3 and on the adjoining property D of defendants Nos. 1 and 2.

In the Courts below the real point of conflict was this. The plaintiff claimed property A, B and C including the chowk under a sale deed, Ex. 45, of June 30, 1916; and defendant No. 3 claimed property D and rights over the chowk under a sale deed, Ex. 48, of July 12, 1919. The vendor in both cases was one Bai Manek, a Hindu widow, as guardian of her minor son. But as regards the later deed, Ex. 48, this was a sale by order of the Court, and accordingly the Nazir as the Mukhtyar appointed by the District Court on behalf of Bai Manek, (the guardian and mother of the minor), was the conveying party. In this second sale it was the Nazir who under the Court's orders had put the property up for sale.

Now it is quite clear that this second sale deed, Ex. 48, purported to grant to defendant No. 3 this house (which I have called property E) with also a right of passage over the chowk and a right to use the water supplied from a pipe in the chowk; and further that the latrine which is in the chowk was expressed to form part of the land conveyed to defendant No. 3.

But the adverse claim of the plaintiff was this: that by the earlier deed, viz., Ex. 45, this very chowk had been conveyed absolutely to the plaintiff, and that moreover the then vendor Bai Manek had covenanted to block up not only the doors in the house D which she retained but also the window in the house E which was subsequently sold to defen-

dant No. 3. Further there was a covenant by her in that sale deed to alter the eaves of both the houses D and E in the way I have indicated, viz., by making the roof run solely to the east so that the rain water would not drop on the chowk but would drop on to the road on the eastern side of the property.

In appeal it was first contended that under the sale-deed, Ex. 45, the chowk did not pass to the plaintiff. But after argument and a careful investigation of the precise terms of the sale-deed, Ex. 45, it was plain that that contention was untenable, and accordingly Diwan Bahadur Rao at a later stage said he could no longer contend that the chowk did not pass to the plaintiff, more especially as that point was practically conceded in the Courts below.

That being so, as regards para. (c) of the injunction, it follows that the plaintiff being the absolute owner of the chowk is entitled to restrain any third person from trespassing on the chowk or using the latrine or the watersupply there. Accordingly, in the view I take, it is unnecessary to refer to section 48 of the Transfer of Property Act. That section refers to a case "where a person purports to create by transfer at different times rights in or over the same immovable property." It may be that that section applies, but in the view I take it is unnecessary to determine it. Here the land itself was conveyed, viz., the chowk. So it is not a question of any mere "rights".

Next, taking para. (b), viz., the mandatory injunction to block up the doors and alter the roof, that is an injunction of a serious character, and it requires to be considered under what jurisdiction the Court was acting when it made it. It has been contended that it was authorised under section 40 of the Transfer of Property Act. That section undoubtedly applies where you get a restrictive covenant restraining or interfering with the use of land. One familiar instance is where a purchaser agrees that a building shall not be used, say, for a hotel, or that no building of any sort shall be erected on particular portions of the land. But in any event it is essential that an assignee of the original covenantor must have notice of the restrictive covenant if he is to be bound by it. That is settled law in England, and it is borne out by the final sentence in section 40 of the Transfer of Property Act.

Had then the present purchaser defendant, No. 3, notice of this covenant, supposing for the sake of argument it can be called a restrictive covenant at all? It must be borne in mind that the position at the date of the sale to him was that not only was the plaintiff the then owner under the sale-deed, Ex. 45, of the lands A, B and C, but that also by mortgages executed after the date of Ex. 45 he was a mortgagee in technical possession of those other properties D and E. According to the judgment of the trial Judge, there were three mortgages of July 3, August 18 and November 13, 1916, for in all a sum of Rs. 1,100 executed in favour of the plaintiff. Two at any rate of those mortgages are exhibited, viz., Ex. 55 and Ex. 56. As far as those mortgages are concerned, they contain no reference on the face of them to this covenant to block up the windows and alter the eaves. There are expressions in the judgment of the learned Subordinate Judge, and I refer in particular to page 11, line 25, which would lead one to think that these mortgages contained statements relative to those covenants similar to those contained in Ex. 45 itself. We have ascertained by reference to the mortgages themselves that this is not so in fact. Accordingly if the defendant No. 3 had called for the production of the mortgages then existing on the property, he would have been told nothing about these covenants.

Further, we have the evidence of the Nazir of the Court, and he deposes that he knew nothing whatever about these particular covenants. He is described by the learned trial Judge as an independent witness, and apparently the trial Judge believed him. But the lower appellate Court appears to have considered that the defendant was guilty of negligence in that he did not ask the plaintiff to produce his deeds not of the suit property E which was being sold, but of the adjoining property A, B and C. I refer to the observations at p. 2, line 40. The lower appellate Court held that as he did not do so he was guilty of gross negligence. With great deference to the learned appellate Judge, I think there is some confusion in this respect. A purchaser may be guilty of negligence in not enquiring for the title-deeds, or the earlier title of the property which he has contracted to buy. But how he can be guilty of negligence in not asking for the

title-deeds of an adjoining property, which *prima facie* he has no right whatever to ask his vendor to produce, is a matter which I confess I cannot follow. After all, as between the vendor and purchaser, it was the duty of the vendor to disclose to the purchaser any covenant such as the one on which the present plaintiff was suing. A purchaser could never have anticipated that the vendor had not only entered into covenants to block up the windows and alter the roof but had also concealed the fact from the Nazir as well as from the purchaser.

Moreover, there is this extremely curious additional fact, *viz.*, that the plaintiff who was entitled to the benefit of this covenant was also the mortgagee of the very property which was subject to the burden of this covenant, and yet he entered into mortgages which contained no reference to this covenant. In effect he stood by for some three years after the original date of the sale-deed to him without enforcing this covenant. Further when it came to the sale by auction, he allowed the property to be sold and conveyed just as if it had been a property unincumbered in any way so far as the alleged restrictive covenant is concerned.

Under these circumstances this question of notice is not a mere question of fact, the finding on which in the lower appellate Court might be binding on us, but it is a mixed question of law and fact. In my judgment, the decisions of the lower Courts are erroneous, and it is not proved that the third defendant, the purchaser, bought this property with notice of these covenants. I may also point out that the learned appellate Judge appears to think that the onus here was on the third defendant to show he had no notice. In fact the onus of proof was the other way, *viz.*, on the plaintiff to show that the third defendant had bought with notice of the covenants.

But even if we had adopted a different view on the question of notice, there still remained one other extremely difficult point in the way of the plaintiff. This point is one which was not touched on in either of the lower Courts. But it is a very simple point based on the thoroughly well established principles laid down in *Austerberry v. Corporation of Oldham* (1),

viz., that the Court will not enforce against an assignee of a covenant an affirmative covenant involving the expenditure of money on land, whether such assignee takes with or without notice. For instance, as against a transferee from a covenantor it will not enforce a covenant to keep roads in repair. In reply, Diwan Bahadur Rao referred us to the case of *Smith v. Colbourne* (2), a case closely resembling the present one, for it was brought on an agreement to block up windows if and when so required. The English Court there held that that was an affirmative covenant involving the expenditure of money and therefore could not be enforced against a transferee even with notice. I would add by way of warning that the above principles do not apply to covenants in leases.

Against this it was said that the above is English law, and that here we are governed by Indian Law, and in particular on this subject by section 40 of the Transfer of Property Act. Speaking for myself, I am reluctant to decide points of law unless it becomes necessary for one to do so. And in the view we take on the point of notice, it is unnecessary for us to decide this further point. I will only say, speaking for myself, that nothing in my judgment must be held to give rise to the view that I am in favour of the contention that in India an affirmative covenant involving the expenditure of money can be enforced in the class of case covered by *Austerberry v. Corporation of Oldham* (1) or that that is the true construction of section 40.

Then there was one other point which I should have mentioned on the point of notice. It was urged that Ex. 45 was registered. Now I will again point out that Ex. 45 dealt with the plaintiff's adjoining land and not with the suit property which was sold to defendant No. 3. If it had been necessary to go in to that point, it might have been necessary to refer to *Ghardhan-das v. Mohanlal* (3) where this appellate Court remanded the case to determine what notice a person would get if he inspected the register. But we think it unnecessary to take that course here, because, as I have said, we are dealing

(1) (1885) 29 Ch. D. 750-55 L.J. Ch. 698-58 L.T. 548-88 W.R. 807-49 J.P. 532.

(2) (1914) 2 Oh. 593-84 L.J. Oh. 112-111 L.T. 927-58 S.J. 789.

(3) (1921) 45 Bom. 170-59 I. O. 506-22 Bom. L. R. 1158.

with the suit land, and there is nothing before us to show that if the defendant had searched the register as regards the suit land, he would have found anything to show him that in a conveyance of certain other land there were covenants which affected the suit property. The onus, as I have already said, was on the plaintiff here to establish the notice, and it is not shown that from any ordinary search in the register the defendant would have got notice of the covenant. Consequently the point of constructive notice must also fail.

Under these circumstances, the appeal will be allowed as regards the para (b) of the decree of the lower Court, and the injunction thereby granted will be discharged. As regards para (a) we think that the injunction must be modified, and that it had better be prefaced by a declaration to the effect that, on the true construction of the sale-deed of June 30, 1916, Ex. 45 the chowk mentioned in the pleadings passed to the plaintiff. Then there will be a permanent injunction restraining all the defendants from entering the plaintiff's house or chowk or any part thereof (including the latrine in the chowk) or from taking any cattle there.

As regards the suggestion that if the door was not to be blocked up, defendant No. 3 might acquire a right of light, it would be quite simple for the plaintiff to stop that by placing a screen or other obstacle which would prevent any such right being acquired. And of course it follows from our judgment that defendant No. 3 will not be allowed to use that door for the purpose of either egress or ingress into or from the chowk.

I wish to add that we have not overlooked the possibility that if this case had been pleaded and argued differently in the Courts below, the plaintiff might have had difficulty in meeting pleas of laches, and also perhaps of estoppel or otherwise by reason of his alleged standing by while this property was sold. But having regard to the course which this case took in the lower Courts, we have not thought it proper to go into those points.

As regards costs, we will not interfere with the order of the trial Judge in so far as it directs the plaintiff to recover his costs of the suit from defendants Nos. 1 and 2. But as regards the costs as between the plaintiff and defendant No. 3 we would discharge all orders in the Court below,

and direct that the plaintiff and defendant No. 3 respectively do each bear their own costs throughout of this suit in all Courts.

Fawcett, J.:—I concur that the appeal should be allowed in regard to the mandatory injunction contained in para. (b) of the decretal order of trial Judge, and that there should also be a variance of the injunction contained in para (c) of that order. The plaintiff has, in my opinion, entirely failed to show that defendant No. 3 had notice of the covenants contained in Ex 45 which are relied upon in this case. Unfortunately no issue regarding this question of notice was raised in the trial Court although defendant No. 3 in his written statement pleaded that he had no knowledge of the plaintiff's sale-deed, Ex. 45. There was only the general issue whether the sale-deed, Ex. 45, was binding on defendant No. 3 in regard to this covenant. The trial Judge has not, so far as I can see, come to any definite finding on this point of notice. He has discussed the question whether the plaintiff was present at the auction and some other questions of that kind in para 15 of his judgment, but there is no definite finding that defendant No. 3 had such notice.

The Judge of the lower appellate Court has, however, held that there was gross negligence on the part of defendant No. 3, who might have got hold of the sale-deed, Ex. 45, from the plaintiff and informed himself of its contents, and he held that an inference accordingly arises that he knew of the deed and its contents. This finding seems to me to be based, as my learned brother has pointed out, on a misconception. I will only add that so far as the question of constructive notice goes, it was for the plaintiff to show that there had been on the part of defendant No. 3 wilful abstention or gross negligence of the kind mentioned in the last clause of section 3 of the Transfer of Property Act. He was no doubt under a duty to have a search made in the Registration Office in regard to the property that was being sold to him. But until it is shown that any such search would have resulted in this particular document, Ex 45, being traced, so that its contents would have become known to him, I do not think it can be said that there was gross negligence or wilful abstention within the meaning of this definition. The plaintiff could have produced an extract of the index kept under section 55

of the Indian Registration Act, showing particulars that would have been ascertained if the defendant No. 3 had made a search. Such an extract was in fact produced in the evidence on remand ordered by this Court in *Gordhandas v. Mohanlal* (3), and in view of that extract it was held that there had been 'notice'.

I do not think it necessary to go into the question whether section 40 of the Transfer of Property Act applies to affirmative covenants involving expenditure of money of the kind referred to in my learned brother's judgment, although at the same time I quite agree with him that this question of law should be decided, if it were necessary to do so. Probably in any case the Court in the exercise of its discretion as to the grant of a mandatory injunction under section 55 of the Specific Relief Act, would have regard to the principles laid down by the Courts in England in this connection.

As, however, in this case no 'notice' has been proved, the plaintiff is not entitled to say that defendant No. 3 is bound by this particular covenant.

Appeal partly allowed.

1925 Bombay 187.

KAJIJI, J.

International Banking Corporation—
Plaintiffs.

v.

H. Pestonji and Co—Defendants.

O. C. J. Suit No. 2776 of 1923, decided on 22nd August, 1924.

Stamp Act, s. 14 Bill of Exchange—Period of payment extended by drawer and accepted by drawee—Bills must be charged afresh.

The bills in suit were originally drawn in August, 1920 payable at ninety days sight. They were accepted by the defendants and after they were accepted, the defendants feeling that they would not be able to meet these drafts on due dates, requested the plaintiffs to write to the drawer to get the time extended. Time was extended by four months from due dates of the Bills of Exchange and due intimation was given to the defendants for acceptance and the defendants re-accepted them. *Held*: that each of these bills became a second instrument and was chargeable with fresh stamp. [P. 188, O. 1]

Campbell and Coltman—for the Plaintiffs.

B. J. Desai, Engineer and Kanga—for the Defendants.

Judgment:—The plaintiffs as holders for value of nineteen bills of exchange mentioned in the plaint have filed this suit to recover from the defendants the amounts due on them.

It appears that these bills were drawn by Messrs. Royle and Binns of Manchester on the defendants and were payable to the order of the drawers. All these bills were re-accepted after time of payment was extended and it is urged on behalf of the defendants that these bills are not admissible in evidence, having regard to the provision of section 14 of the Indian Stamp Act.

It appears that these bills were originally drawn in August, 1920 payable at ninety days' sight. They were accepted by the defendants and, after they were accepted, the defendants felt that they would not be able to meet these drafts on due dates, so they requested the plaintiffs to write to their home friends to get the time extended and they stated that Messrs. Royle and Binns were not unwilling to do so. Time was extended by four months from due dates of the bills of exchange and due intimation was given to the defendants of the same. Then these bills were re-presented to the defendants for acceptance and the defendants re-accepted them.

It is now urged that these amount to second instruments and as such, under section 14 of the Indian Stamp Act, a fresh stamp is necessary, and, as there is no fresh stamp on these bills of exchange, these bills are inadmissible under section 35 of the Indian Stamp Act. There is no doubt that, if the due date had not been extended, it would have been a perfectly good bill, or if the original intention of the parties was that those bills should not be payable after ninety days' sight but ninety days plus four months and the words "ninety days after sight" were inserted in the bills by mistake, then in such a case the bills could be altered because there was a mistake, and, if it is so altered, it does not require a fresh stamp. But it is nobody's case here that it was intended from the very beginning that the time of payment should be seven months after sight. Therefore the alteration from ninety days to four months after the due date is not altered because it was a mistake but it is altered in consequence of a new arrangement arrived at between three parties, viz., the drawers, the bank and the

acceptor. But it is urged that on the face of it there is no alteration, that is to say, that the words "ninety days after sight" are not struck out and there is no alteration on the face of it, and the due date in red ink which is put on the top of the bill on the right-hand side is made by the bank in Bombay simply for their own convenience, and it is a mere memorandum, and therefore that does not amount to an alteration on the face of it. I see no force in this argument. In my opinion it amounts to an alteration. It is everybody's case that ninety days were extended to four months after the first due date. Whether the red ink memorandum on the top of the bill of the second due date was there or not it makes no difference. I believe the evidence of Mr. Bremmer that it was not there when the bills were presented for re-acceptance. Everybody knew that the date of payment of these bills of exchange was extended by four months from the first due date. It must be held, under these circumstances, that the original bill was extinguished and a new bill was substituted in its place which was re-accepted and the due date of it was four months after the first due date. The cases of *Cordwell v. Martin* (1) and *Outhwaite v. Luntley* (2) are authorities to show that if the bill is altered or it is so altered with the consent of the parties, and such altered bill of exchange does not bear a fresh stamp, then such bill would not be admissible in evidence and the plaintiff would be non-suited on such bill.

Mr. Campbell for the plaintiffs has urged that there is no such alteration on these bills because "ninety days after sight" is not struck out and "four months after September 2" is not substituted in its place. Everybody knew when the re-accepted bills were payable. Whether actual due date was put or not it is not important, for the parties knew that new bills were substituted for old ones and that is a second instrument within the meaning of section 14 of the Indian Stamp Act and it makes a new bill on an old document. Mr. Campbell has also urged that it was intended that if the second bill is not met, the first bill would still be in existence and the first bill would be extinguished only if the

second bill is fulfilled. There is absolutely no evidence to show that that was the intention of the parties. The evidence of the Assistant Manager of the plaintiff bank seems to me to be quite clear that the parties agreed that the extension of time should be allowed by four months and that the old bill was not to be enforced. The case of *Reed v. Deere* (3) is an authority in point that if a second bill is taken and even if that second bill is ineffectual for some reason or other, you cannot file a suit on the first bill. Therefore these bills which are marked XI are inadmissible in evidence. The suit must, therefore, be dismissed with costs.

Suit dismissed.

(3) (1927) 7 B. & C. 261 = 1 Car. & P. 621 = 31 R. R. 190.

* 1925 Bombay 188.

MARTEN AND FAWCETT, JJ.

Vadilal Raghavji—Plaintiff-Appellant
v.

Maneklal Mansukhbhai — Defendant-Respondent.

F. A. No. 154 of 1922, decided on 5th September, 1924, from the decision of Sub-Judge, Ahmedabad, in Suit No. 276 of 1919.

* (a) *Company—Share-holder misappropriating company's goods—Majority supporting the act—Minority can sue.*

Minority has a right to sue one of the share-holders forming majority for acts of misappropriation of company's goods on the part of that shareholder, even though the majority approved of his acts. [P. 190, C. 2.]

* (b) *Practice—Right to sue—Court should lean in favour of its existence.*

Per *Fawcett, J.*:—In considering the question whether a person has a right to sue, the Court should lean in favour of that right, unless it is plainly shown that the suit is barred. [P. 192, C. 1.]

H. C. Coyajee and Solomon Moses—for the Appellant.

Chiman Lal Setalvad and B. J. Desai—for the Respondents.

Marten, J.:—This is a first appeal from the judgment of Mr. K. J. Desai, First Class Subordinate Judge at Ahmedabad, dismissing the plaintiff's suit on the preliminary issues Nos. 1, 2, 4, 6, 7 and 8. In effect these preliminary issues are in the nature of what would have been in old days a demurrer to the plaintiff's case as pleaded in his plaint.

(1) (1907) 1 Camp 79.

(2) (1815) 4 Camp 179 = 16 R.R. 771.

The suit is one brought by the plaintiff on behalf of himself and all other shareholders in the defendant company except the first defendant and his nominees and those under his control. The first defendant is the manager and agent of the defendant company, or as the phrase runs in India, one of its Secretaries, Treasurers and Agents, and his firm was so appointed in the Memorandum of Association itself as is unfortunately often done in this Presidency.

The charges brought against defendant No. 1 are based on fraud. Para 5 of the plaint alleges that the first defendant's firm as agents of the company have been guilty of frauds as thereafter mentioned and they decline to allow the plaintiff to inspect the account books of the company as they are afraid that such inspection will assist the plaintiff in exposing the frauds aforesaid. Para 6 alleges that :—

" The first defendant's firm have taken advantage of the fiduciary position they occupy towards the company and have obtained pecuniary advantage for themselves (1) by on divers occasions wrongfully diverting the goods of the company or to which the company were entitled to their own use and advantage ; (2) by appropriating to their own use large profits made in transactions entered into in the name of the company in cotton, all of which transactions have been concealed from the company and not entered in the account books of the company."

Certain particulars are then given in the plaint and it is alleged that in addition to the particulars given there are other instances of fraud which would only be brought to light on a proper discovery. Then the prayer asks for an account of all profits and pecuniary advantages obtained by the first defendant by reason of his wrongful acts and for payment of the same, and an account of the profits he has made by the use of the company's money and for the payment of the same.

The plaint further alleges that the defendant No. 1 himself holds 620 shares out of the 924 shares of the company, and that with the shares held by his co-directors who are his relations or nominees or friends he can control in all some 647 shares, and that as the minority of the share-holders hold only 277 shares, it is impossible for the suit to be brought in the name of the company as the Board would not allow it, and accordingly the plaintiff is entitled to sue on behalf of himself and the other share-holders.

The plaint was filed on March 7, 1919. On April 1, 1919 an extraordinary meeting was held of the defendant company at which in effect the plaintiff's suit was repudiated, and the company affirmed the past mode of dealing between the first defendant and the company, and also the course which defendant No. 1 had taken in regard to the matters complained of in the plaint. At that meeting the plaintiff was in a minority of one. Everybody there who was present in person or by proxy voted against him, so that quite apart from what I may call the interested votes of the first defendant and his co-directors, there was an independent majority against the plaintiff. It does, however, appear that some thirteen shareholders holding in all twenty-six shares did not attend the meeting either in person or by proxy, but in any event their voting would not have affected the result actually arrived at.

Under these circumstances it has been held by the learned trial Judge that the plaintiff cannot maintain the suit inasmuch as the majority of the company do not desire it to be brought. Further as regards the second branch of the complaint he held that the cotton transactions in question were *ultra vires* the company and that consequently in no event could the company claim the benefit of the transactions. He accordingly dismissed the plaintiff's suit.

I wish to emphasize that for the purpose of testing whether this suit should be stopped at the outset, or whether it may proceed to trial we can only take the plaint before us and must assume for the sake of argument that all the allegations in the plaint are proved. Nothing therefore that I may say in my judgment must be taken as in the least implying that these odious charges of fraud are in any way proved against the first defendant. On the contrary, without in any way desiring to prejudice the trial of the action, it may be that when the plaintiff's allegations come to be tested or if evidence is adduced by the defendant which establishes the accuracy and truth of what he has pleaded in his written statement, then the defendant may satisfactorily prove to the trial Court that there is no fraud here whatever. But we are at present in this embarrassing position that we cannot go into the truth of the written statement, because naturally under

the circumstances no evidence has been taken by the learned Judge. We are, therefore, really in the dark as to what are the true facts and can only act on the allegation in the plaint.

Now I have read the plaint more than once, but shortly stated it alleges something like an illegal abstraction of the assets of the company by its fiduciary agent. The allegations might in certain circumstances amount to criminal breach of trust or to theft. And to test the question whether a majority can bind a minority under these circumstances, I put it to Sir Chimanlal Setalvad whether supposing a case was one of actual theft and the fiduciary agent had actually stolen the assets of the company counsel still contended that the majority of the share-holders could bind the minority not to recover those stolen assets of the company. Counsel was forced to argue that the majority could bind the minority. It was then pointed out to him that a limited liability company is strictly regulated by Statute and by the powers conferred by its Memorandum and Articles of Association. I was not surprised to find that counsel was unable to cite any authority for the proposition that a majority of share-holders may allow the assets of the company to be dissipated in thefts by its trusted agents. On general principles this proposition is clearly erroneous. The assets of the company, so far as they represent profits, may be distributed by way of dividend, capital assets may be distributed in a winding up or in certain other limited ways under the Indian Companies Act. But this present Memorandum of Association or rather the rough translation before us affords no ground for thinking that any such power as is here contended for is either expressly given or should properly be implied as incidental to that business which the company is there authorised to carry on. There is not even any express power to lend money at all either to the agent or anybody else. Much less is there any power to let it be stolen. This objection to my mind goes practically to the root of the whole case, and sufficient to dispose of it, for the difference between theft and the gross fraud pleaded here is an insufficient distinction in principle.

But it was strenuously argued before us that even if you put aside this tainted majority of votes held by the first defendant,

still even then the overwhelming independent body of share-holders wanted this action to be stopped, and that accordingly it cannot proceed. It was further argued that all the cases in which a suit on the present lines has been allowed to proceed were cases in which what one may call the tainted votes were either the actual majority which passed the particular resolution or else where a deciding factor in turning the balance of the voting on the particular resolution. That appears to be so. But on the other hand no authority was cited to us in support of this other argument, viz., that an independent majority is sufficient for the main proposition for which Sir Chimanlal was contending. I may, however, observe that in a case like this where fraud is alleged, and where consequently it is alleged that the suit is within one of the recognised exceptions to the principles laid down in *Foss v. Harbottle* (1) it will, I think, in general be found that the case is allowed to go to trial to ascertain the facts before it is finally determined whether the action of the majority can in fact bind the minority. This is because until the facts are ascertained with some distinctness, it is difficult to say what is the precise action of the majority, and whether it only amounts on the one hand to those matters of internal management where the majority of the share-holders can rightly impose their will upon the minority, or whether on the other hand it is one of those cases in which the assets of the company are being improperly distributed by an attempt to pay them into the pockets of the majority of share-holders of the company or their friends at the expense of the minority.

In *Buralnd v. Earle* (2) Lord Davey sets out with his usual clearness the rules governing the present class of suits. I need not read the whole page. But, after stating the ordinary rule laid down in *Foss v. Harbottle* (1) he comes to the exceptions and says (p. 93):—

"The cases in which the minority can maintain such an action are, therefore, confined to those in which the acts complained of are of a fraudulent character or beyond the powers of the Company. A familiar example is where the majority are endeavouring directly or indirectly to appropriate to themselves money, property or advantages which belong to the company, or in

(1) (1813) 2 Haro. 461.

(2) (1901) A.C. 91=71 L.J.P.O. 1=95 L.T. 559=50 W.R. 241=9 Manson 17=19 T.L.R. 41.

which the other shareholders are entitled to participate, as was alleged in the case of *Menier v. Hooper's Telegraphic Works* (3). It should be added that no mere informality or irregularity which can be remedied by the majority will entitle the minority to sue, if the act when done regularly would be within the powers of the company and the intention of the majority of the share-holders is clear. This may be illustrated by the judgment of Mellish, L.J., in *MacDougall v. Gardiner* (4)."

Then in *Cook v. Deeks* (5) their Lordships of the Privy Council say at p. 564:—

"It, as their Lordships find on the facts, the contract in question was entered into under such circumstances that the directors could not retain the benefit of it for themselves, then it belonged in equity to the company and ought to have been dealt with as an asset of the company. Even supposing it be not *ultra vires* of a company to make a present to its directors, it appears quite certain that directors holding a majority of votes would not be permitted to make a present to themselves. This would be to allow a majority to oppress the minority. To such circumstances the cases of *North-West Transportation Company v. Beatty* (6) and *Burland v. Earle* (2) have no application. In the same way, if directors have acquired for themselves property or rights which they must be regarded as holding on behalf of the company, a resolution that the rights of the company should be disregarded in the matter would amount to forfeiting the interest and property of the minority of shareholders in favour of the majority, and that by the votes of those who are interested in securing the property for themselves. Such use of voting power has never been sanctioned by the Courts, and, indeed, was expressly disapproved in the case of *Menier v. Hooper's Telegraph Works*" (3).

Then we have *North-West Transportation Company v. Beatty*. (6) That was a case on the other side of the line where it was held that the directors were not prevented from voting in a case where the proposed purchase of a steamer was a perfectly fair contract at a proper price. But even there the judgment says at p. 600:—

"It may be quite right that, in such a case, the opposing minority should be able, in a suit like this, to challenge the transaction, and to show that it is an improper one, and to be freed from the objection that a suit with such an object can only be maintained by the company itself."

That is an instance of another case which went to trial and where it was not even attempted to shut out the plaintiffs by proceedings in the nature of a demurrer.

(3) (1874) 9 Ch. 850—43 L.J. Ch. 390—80 L.T. 909—22 W.R. 896.

(4) (1875) 1 Ch. 18—45 L.J. Ch. 27.

(5) (1916) 1 A.C. 554—85 L.J. P.O. 161—114 L.T. 636 (P.O.)

(6) (1887) 12 A.O. 589—50 L.J.P.O. 102—57 L.T. 426—86 W.R. 647.

Then in *Menier v. Hooper's Telegraph Works* (3), Lord Justice Mellish at p. 354 says:

"I am of opinion that although it may be quite true that the share-holders of a company may vote as they please, and for the purpose of their own interests, yet that the majority of share-holders cannot sell the assets of the company and keep the consideration, but must allow the minority to have their share of any consideration which may come to them."

So, too, in *Alexander v. Automatic Telephone Company* (7), Lord Lindley says (p. 69):—

"It is necessary, however, to consider the form of the action, and the relief which can be given. The breach of duty to the company consists in depriving it of the use of the money which the directors ought to have paid up sooner than they did. I cannot regard the case as one of mere internal management which, according to *Foss v. Harbottle* (1) and numerous other cases, the Court leaves the shareholders to settle amongst themselves. It was ascertained and admitted at the trial that, when this action was commenced the defendants held such a preponderance of shares that they could not be controlled by the other share-holders. Under these circumstances an action by some share-holders on behalf of themselves and the others against the defendants is in accordance with the authorities, and is unobjectionable in form: see *Menier v. Hooper's Telegraph Works* (3). An action in this form is far preferable to an action in the name of the company, and then a fight as to the right to use its name. But this last mode of procedure is the only other open to a minority of share-holders in cases like the present."

In that case it was alleged that the directors had used their powers under the articles of making calls on shares in such a way that they were not obliged to pay their calls at the same time as the other share-holders, and it was eventually held that they must account for the profits which they had thereby made.

Under these circumstances, it seems to me that at any rate as regards the first branch of this case, viz., the improper diversion of the goods of the company to the first defendant's private use the allegations must be investigated at the trial, and that at the present time we ought not to prevent this case from being heard. Similarly as regards the question as to the profits over the cotton contracts, we think that that matter must also go for trial and that the facts of the case must be ascertained.

In saying this I wish to be clearly understood that this does not mean that these

(7) (1900) 2 Ch. 56—69 L.J. Ch. 424—84 L.T. 400—49 W.R. 516—16 T.L.R. 339.

so-called preliminary issues Nos. 1, 2, 4, 6, 7 and 8 are answered in favour of the plaintiff. It merely means that in our opinion no answer at the present stage ought to be given to the issues until the suit has been properly heard at the trial. In other words, they are not in the present case, having regard to the plaintiff's pleading, proper preliminary issues. And I wish again to say that in the absence of any evidence, it is quite impossible for us to go into the business matters raised in the written statement of the defendants and in particular to determine whether the alleged system of joint purchase was one which the majority of the share-holders could under certain circumstances when proved bind the minority. [His Lordship dealt with discovery and costs and set aside the lower Court's judgment and remanded the suit for trial on all the issues raised].

Fawcett, J. :—I concur. I fully appreciate the distinction which Sir Chimanlal Setalvad for defendant No. 1 has put before us that in the present case there was an independent majority against the plaintiff's suit. But I am not convinced that the English authorities do not favour the plaintiff's right of suit inasmuch as the defendant No. 1 has a controlling voice in the voting on resolutions at meetings of the company ; and at the date the plaint was filed, the plaintiff was in a position to rely upon that fact as bringing the suit within recognised exceptions to the rule laid down in *Foss v. Harbottle* (1) and other similar cases.

I think that in considering the question whether a person has a right to sue, the Court should lean in favour of that right, unless it is plainly shown that the suit is barred. And I agree with my learned brother that the present is a case where it cannot properly be held that the plaintiff's suit does not lie at all. It is only after the main facts regarding the alleged frauds have been ascertained that it can be decided whether the resolution relied on by the company bars the suit.

Appeal allowed.

1925 Bombay 592.

MACLEOD, C.J. AND CRUMP, J.

Emperor.

v.

Jinga Gamaji.

Criminal Application for Review No. 268 of 1924, decided on 20th November, 1924, against the decision of Sub-Divisional Magistrate, Nasik.

Crim. Pro. Code, S. 562—Section applies even where imprisonment is obligatory. (But see S. 562 as amended.)

On a proper construction of S. 562, a first offender, provided the other provisions of the section apply, is entitled to the benefit of the section, even when without such provisions the Magistrate would be obliged to pass a sentence of imprisonment. (In this case the accused was found guilty under S. 381, I.P.C., and his release was held proper. See amended S. 562.—Ed.) [P. 192, C. 2.]

There was no appearance on either side.

Macleod, C.J.—The accused was convicted under section 381, Indian Penal Code, of the theft of gold and silver ornaments and clothes belonging to the complainant in whose service he had been for three years as a cook. The Magistrate convicted him, and as it was his first offence, ordered him to be released on a bond on probation of good conduct for a period of one year under section 562, Criminal Procedure Code. The matter has been referred to this Court on the ground that as sentence of imprisonment is obligatory when an offence under section 381, Indian Penal Code, has been proved, the Magistrate could not give the convicted person the benefit of section 562, Criminal Procedure Code. We think that on a proper construction of section 562, a first offender, provided the other provisions of the section apply, is entitled to the benefit of the section, even when without such provisions the Magistrate would be obliged to pass a sentence of imprisonment. Any other construction would entirely nullify in a great number of cases the provisions of section 562. We discharge the rule.

Rule discharged.

1925 BOMBAY 193

SHAH, AG. C. J. AND FAWCETT, J.

Narayan Ganesh Patankar—Defendant—Appellant.

v.

Sagunabai Gangadhar Patankar—Plaintiff—Respondent.

S. A. No. 482 of 1923, Decided on 7th August 1924, from the decision of Dist. J. of Satara, in A. No. 630 of 1921.

Hindu Law—Joint family—Father's debt—Sons' share can be sold in execution of decree against father.

A money decree passed against a Hindu father can be executed against ancestral property in his hands inclusive of his son's interest and the fact that the sons were brought on record as heirs of their father on his death pending appeal in the original proceedings does not make any difference. [P. 193, C. 2]

M. V. Bhat—for Appellant.

S. R. Bakhale—for Respondent.

Shah Ag. C. J.—In this case a decree was obtained by Sagunabai, the plaintiff, against one Ganesh for Rs. 1,221-11-1. While the appeal was pending in the District Court Ganesh died, and his son, the present appellant Narayan, was brought on the record as the legal representative of his deceased father. The District Court confirmed the decree of the trial Court, and this Court also confirmed that decree in S. A. No. 730 of 1917. The plaintiff now seeks to execute that decree by attaching the interest of Narayan and his deceased father in the ancestral house. It is admitted that during the lifetime of Ganesh, Ganesh and Narayan had one-third share in the house, and that is the interest which is attached in execution by the order of the learned District Judge in appeal.

The defendant has appealed from the order of the District Judge, and in support of the appeal it is contended that the son's interest, i.e., one-sixth share in the house, is not liable to be attached, but it is only the interest which Ganesh had during his lifetime in this house that is liable to be attached. This contention is not tenable. It is contrary to the decisions of this Court in *Umed Hathising v. Goman Bhaiji* (1) and *Shivram v. Sakharan* (2).

(1) [1895] 30 Bom. 385.

(2) [1908] 33 Bom. 39=10 Bom. L. R. 939.

In the case of *Shivram v. Sakharan* (2) the father died during the pendency of the litigation and, the son was brought on the record, as in the present case, as the legal representative of the father. It is clear that so far as the ancestral property is concerned whatever was liable to be sold in the lifetime of the father remains liable to be sold after the father's death. S. 53 of the Civil Procedure Code makes the position clear on the point which before 1908 was the same according to the decisions to which I have referred. It has been held in *Hanmant Kashinath v. Ganesh Annaji* (3) that during lifetime of the father the whole of the one-third share including the interest of the son in this ancestral house would be liable to be attached. On principle it makes no difference that the father has died and the attachment comes to be levied after his death. The position is made further clear by the recent pronouncement of their lordships of the Privy Council in *Brij Narain v. Mangla Prasad* (4) where among the propositions categorically stated, it is distinctly laid down that a father can by incurring debt, so long as it is not for an immoral purpose, lay the estate open to be taken in execution proceedings upon a decree for payment of that debt if the other member of the family happens to be his son. In that judgment their lordships refer to the following observations of Mr. Justice Chandavarkar in *Govind v. Sakharan* (5) with approval:—

"The law is now well established that under the Hindu law, the pious obligation of a son to pay his father's debts exists whether the father is alive or dead."

It is not disputed, and it cannot be disputed, in the present case, that for this debt the son's interest in the ancestral property would be liable in respect of the debt in question during the lifetime of the father, and the same liability continues after his death.

(3) [1918] 13 B. m. 513=51 I. J. 61.=21 B. m. L. R. 435.

(4) 1924 P. O. 50=46 All. 95=51 I. A. 129=21 A. L. J. 934=L. R. 5 P. O. 1=28 C. W. N 253=46 M. L. J. 23=5 P. L. T. 1=2 P. t. L. R. 41=(1934) M. A. N. 68=19 M. L. W. 72=33 M. L. T. 157=46 B. m. L. R. 500=11 O. L. J. 107 (P. O.)

(5) [1904] 28 Bom. 383=6 Bom. L. R. 314.

It has been urged in support of the appeal that the view taken in all these cases is contrary to the provisions of Bom. Act VII of 1866, and S. 2 of that Act is relied upon. I do not think, however, that the provisions of that section help the appellant at all. If we treat the ancestral property as belonging to the deceased father, then by attachment of that property the provisions of S. 2 of Bom. Act VII of 1866 are not in any way contravened, because that property continues to be liable for the debt of the father. That is the reason why this Act has not been held to present any difficulty in the cases prior to the Code of 1908, and S. 53 in the Code of 1908 is in effect a legislative recognition of the rule that was followed in this Presidency before it was enacted. I do not feel any hesitation in holding that the contention of the appellant is without any good foundation. I would dismiss the appeal and confirm the order of the lower appellate Court with costs.

Fawcett, J.—I agree.

Appeal rejected.

1925 BOMBAY 194

SHAH. AG. C. J. AND FAWCETT, J.

Ramchandra Pandurang Jahagir-dar—Plaintiff—Appellant.

v.

Yellava Madar—Defendant—Respondent.

S. A. No. 492 of 1923, Decided on 8th August 1924, from the decision of Asst. J. at Dharwar in Appeal No. 24 of 1921.

Registration Act, S. 17 (1) (b)—Order by inamdar to village officers that certain lands be continued as theretofore for services, is not compulsorily registrable.

Compulsory registration under S. 17 of the Registration Act does not apply to an order issued by an inamdar to the village officer pointing out that certain lands are continued from generation to generation on the grantees of the lands agreeing to do the *mhorki* work.

[P. 195, C. 1]

A. J. Desai—for Appellant.

G. S. Mulgaonkar—for Respondent.

Shah, Ag. C. J.—In this appeal the question is whether the document,

which purports to be a true copy of a certain order, addressed by the then Inamdar of the village to the village officers, is admissible in evidence. In connection with that point it is urged that the original order required registration. This question arises in connection with the point as to whether defendant No. 1 is proved to be a permanent tenant of the land in question. The case for the plaintiff in the lower Court was that defendant No. 1 was an annual tenant. Both the Courts have found that she is a permanent tenant, and it is clear that if the copy to which I have referred is admissible in evidence, the permanent tenancy is proved.

The point of registration was not urged in either of the lower Courts, and though it has been urged here, I feel clear that the point has no merit in it. It is an order directed by the Inamdar to the village officers in which certain directions as to this land are given. It is pointed out there that the village officers are to treat this land as held by the defendant on a permanent tenure on payment of a certain rent. I am unable to hold that such a document either creates or declares any right. It only affords evidence of what the true nature of the tenancy was. The best evidence of such an order, in the absence of the order itself, would be a copy, such as the defendant No. 1 has produced in this case. It was urged in the lower Courts, and it has been argued before that it is not admissible in evidence because the original order is not a public document. It seems to me that the lower appellate Court was perfectly right in admitting the document as affording secondary evidence of the order which would be in the custody of the plaintiff; and the defendants could prove it, as the plaintiff has not produced the original. The copy was rightly admitted, and if we hold that it was properly admitted and that the original order does not require registration, the finding as to permanent tenancy must be accepted.

It has been urged that the plaintiff has a right to enhance the rent, even though the tenancy may be perma-

nent. The claim made for higher rent in the suit was not on the footing of the tenancy being permanent, but on the footing of the tenancy being annual. There is no indication in this suit that the plaintiff contended that he had a right to enhance the rent, even though the tenancy was permanent. It is difficult to see how in view of the statement by the predecessor-in-title of the present plaintiff in the order, of which a copy has been put in, he could contend that he has a right to enhance the rent.

I would disallow the contentions urged in support of this appeal and dismiss the appeal with costs.

Fawcett, J.—I agree. I think the document in question does not fall under clause (b) of sub-section (1) of S 17 of the Indian Registration Act, but is a document of the class where there is merely a recital of something that has already taken place. The words in it about continuing the land without obstruction from generation to generation and the Mharki work of the village being done, must be read with the connected sentence. "on this undertaking the land has been given"; and inasmuch as the document already says that the land has been for many days i.e., for a long time, continuing with a certain person, namely, Durga Holer, it merely, I think, amounts to reciting the arrangement under which the predecessors-in-title of Durga Holer obtained the land, namely, that they should do Mharki work of the village, and on that condition the lands would be continued to that family from generation to generation. The main purpose of the document is to order the village officers to collect an increased assessment. Therefore I think the appeal fails and must be dismissed with costs.

Appeal rejected.

1925 BOMBAY 195

MARTEN AND FAWCETT, JJ.

Motiram Hari—Accused—Appellant.

v.

Emperor—Opposite Party.

Criminal Appeal No. 123 of 1924
Decided 15th September 1924, from a
decision of Addl. Sess. J. at Jalgaon.

Evidence Act. S. 14—Former judgment more than 25 years old and convicting accused of decoity is admissible in a case under S. 401 I. P.C. for showing criminal tendency to commit theft and not habit of committing theft—Evidence Act S. 11—Evidence Act. S. 54 Expl. n (2).

When offence charged against an accused is that of belonging to a gang of thieves, a former judgment more than 25 years old and convicting him of decoity is admissible in evidence, though the former judgment is useful only for the purpose of proving that the accused is a person of criminal tendencies to commit theft who may be a member of the alleged gang. The judgment by no means goes to show that he had any habit of committing theft in the period under consideration. 14 Bom. L. R. 373 and 38 Cal. 408 Foll.

[P. 195, C. 2.]

R. W. Desai—for Appellant.

S. S. Patkar—for the Crown.

Facts.—This was an appeal by the accused who had been convicted in December 1923, by the lower Court, of the offence of belonging to a gang of thieves.

Fawcett, J.—[In the course of his judgment, his lordship, referring to the objection that was taken to the lower Court's judgment on the ground that at the trial, a certified copy of a judgment of Dec. 1897, had been let in, which showed that the accused was then convicted of decoity, observed:—]

It is clear, however, that this evidence was admissible under the rulings of this Court in *Emperor v. Tukaram Malhari* (1), and of the Calcutta High Court in *Bhonai v. Emperor* (2); and we see no reason to take a different view. But, as regards the weight to be attached to this piece of evidence, I think that the conviction was so long ago that it is useless except for showing that accused No. 1 is a person of criminal tendencies of theft who might be a member of the alleged gang. It certainly does not go to show that he had any habit of committing theft in the period under consideration, for he might have reformed since he was released from jail.

[The further portions of his Lordship's judgment are not material to our report. In the end, the appeal was dismissed.]

Appeal rejected.

(1) (1912) 14 Bom. L. R. 373=15 I. O. 811=13 Cr. L. J. 539.

(2) [1911] 38 Cal. 408=15 C. W. N. 461=9 I. O. 555=12 Cr. L. J. 97.

★ 1925 BOMBAY 196

SHAH AND KEMP, JJ.

Hari Ramchandra Navare—Plaintiff
—Applicant.

v.

G. I. P. Ry. Co.—Defendants—Opponents.

Civil Application No. 351 of 1922, Decided on 12th July 1923, for reversal of the decision passed by Judge, Small Cause Court, Poona, in Suit No. 3973 of 1921.

★ *Railways Act, S. 72—Rules under the Act—R. 34A does not apply if Railway offers different goods from those consigned for despatch.*

Plaintiff sued the G. I. P. Railway Co., for the value of the goods which consisted of goat-skins consigned by him at Ahmednagar for despatch to Poona. The noting of "contents unknown" was not properly done and instead of the bags containing the goat-skins some other consignment of 9 bags containing sheep-skins reached Poona. These 9 bags were offered to the plaintiff, but he naturally declined to accept them. Ultimately the Railway Co. sold these 9 bags containing sheep-skins and realised Rs. 140.

Held: that rule 34A could not help the defendant in the present case, because if the sender does not comply with the rule, the consignment will be booked as "contents unknown", and the Railway will not be responsible for the number, condition and description or contents of such consignment but as "contents unknown" was not properly done the Railway is responsible for the loss [P. 196, C. 2]

G. N. Thakor and R. A. Jahagirdar—for Applicant.

Campbell—for Opponents

Judgment. — The plaintiff in this case sued the G. I. P. Railway Co., for the value of the goods which consisted of goat skins consigned by him at Ahmednagar on the 11th July 1921, for dispatch to Poona. It appears that instead of the bags containing the goat-skins some other consignment of 9 bags containing sheep-skins reached Poona. These 9 bags were offered to the plaintiff, but he naturally declined to accept them. Ultimately the Railway Co. sold these 9 bags containing sheep-skins and realised Rs. 140/-

The plaintiff's claim was for Rs. 932 8 0 as representing the value of goods lost through the negligence of the Railway Company. The Company put the plaintiff to the proof of the value of the goods, and also contended that on account of the non-observance

by the plaintiff of R. 34A the Company was not liable. There was some confusion in the identification and the marking of the goods at Ahmednagar. As a result of these pleadings the following four points were raised for decision:—

1. Were plaintiff's bags correctly marked 48?

2. Were bags marked 48 not plaintiff's?

3. What is the value?

4. Whether suit is not tenable as contended by defendant.

The learned Judge found that the suit was maintainable. The learned Judge also found that the plaintiff's bags were not marked 48, and he also found that the bags marked 48 were not the plaintiff's bags. In effect it was found that the bags offered to the plaintiff at Poona were not the bags consigned by him at Ahmednagar. The learned Judge also found that this was due to the negligence of the servants of the Railway Company. But the learned Judge found that the plaintiff did not observe the requirements of rule 34A, and therefore, he was not entitled to the relief claimed. But he proceeded to award a sum of Rs. 140/- minus freight and tax to the plaintiff, which was the sum realised by the Railway Company from the sale of the 9 bags, which were received at Poona, and which contained sheep-skins.

The result reached by the learned Judge is really anomalous, and cannot be accepted as being in accordance with law. If the findings of the learned Judge on the main questions of fact are accepted, it is clear that the defendant Company received the consignment of 9 bags at Ahmednagar, and they never delivered that consignment to the plaintiff at Poona. Therefore it seems to us that the defendant Company was liable to pay to the plaintiff the value of the goods. We do not think that rule 34A can help the defendant in the present case, because if the sender does not comply with the rules, the consignment will be booked as "contents unknown", and the Railway will not be responsible for the number, condition and description or contents of such consignment. The learned Judge has

found that the noting of the words "contents unknown" was not properly done, and the loss of goods was due really to the negligence of the servants of the Railway Company at Ah nednagar.

Under these circumstances assuming without deciding that the rule is otherwise a valid and binding rule it is difficult to hold that the Company is absolved under that rule from liability under the Risk Note to pay for the value of the goods. It is not contended before us on behalf of the Railway Company that having regard to the terms of the Risk Note A, and the facts as found by the learned Judge, the liability could be disputed. Unfortunately the learned Judge has not found what the value of the goods was. Point No. 3 was raised and the finding is that the value is Rs. 133-2-0. That really does not represent the value of the goods consigned by the plaintiff to the Company. That is only the value of the goods which admittedly were not the goods of the plaintiff.

The lower Court should really find what the value of the goods was, and pass a decree for that amount. We make the Rule absolute, set aside the decree and send back the case for disposal in accordance with this judgment. Parties to be at liberty to adduce evidence on the question of valuation.

The defendant to pay the plaintiff's costs of this application. Costs of the suit to be dealt with by the lower Court.

Petition allowed.

Case remanded.

1925 BOMBAY 197

SHAH, AG. C. J. AND FAWCETT, J.

Secretary of State.

v.

Girjabai Shivdeorao Vinchurkar

Cross Appeals Nos. 245 and 251 of 1920, Decided on 15th August 1924, from the decision of Dist. Judge of Nasik, in Suit No. 5 of 1924.

Land tenures — Saranjam — Grant of royal share of revenue — Resumption of grant does not operate on mirasi or occupancy right of which saranjamdar has become khatedar during continuance of grant.

When a grant of the royal share of the revenue takes place and the grant is resumed by the Government afterwards, the Government, do not acquire the *mirasi* or the occupancy right which is a heritable and transferable right in holdings of which the *saranjamdar* has become the *khatedar* during the continuance of the grant, either by surrender or forfeiture. [P. 201, C. 3]

H. C. Coyajee and S. S. Patkar—for Secretary of State.

G. N. Thakor and S. R. Bakhale—for Girjabai

Facts.—The suit out of which the present appeal arose was filed by Girija Bai for a declaration that a certain order passed by the Commissioner, C. D. was illegal and that certain property was the private property of her husband's family. She also prayed for an injunction restraining Government from interfering with her possession.

The facts of the case were that the plaintiff's husband's family, the Vinchurkars, had held Saranjam of certain villages including Manmad for a very long time. Gradually also they had acquired the rights of some of the Khatedars of Manmad who held Mirasi or occupancy rights over their land either by surrender or forfeiture. Survey numbers described as A to E and F to K were the fields over which these rights had been exercised by the Vinchurkars.

Now in 1889 the plaintiff's husband Shivdeorao was adopted by Raghunath Rao who represented one of the three branches of Vinchurkar family and who was on his death-bed. On his death, the Government refused to recognise Shivdeorao's adoption and resumed the whole Saranjam grant and the Mirasi and occupancy rights referred to above. The grant lands were then divided between the Government and the two other branches of the family. In this division, the Manmad lands were taken by the Government. The Vinchurkars kept on claiming the Manmad lands as their private property. In 1913 was passed the order by the Commissioner C. D. against which the present suit

was directed. That order declared that the lands became the property of the Government on the lapse of the Saranjam to Government. Shivdeorao was then dispossessed of lands A to G and in respect of lands H to K he was asked to pay rent according to the rates that might be prescribed by the Collector. Shivdeorao died. His widow, Girija Bai then appealed to the Government against the Commissioner's order and afterwards filed the present suit. In support of her claim, Girija Bai relied on a sale deed of 1755 and in the alternative on adverse possession for a period of about 150 years and acquiescence on the part of the defendant. The trial Court held that the suit lands were not purchased in 1755 and that her ancestors became owners of the lands either when any line of Khatedars or tenants became extinct or a tenant gave up his holding or lost it by sequestration for non-payment of land revenue. He held that the Saranjamdar was entitled to use the lands to his best advantage and apart from the right of the defendant to levy full assessment on the lands, the plaintiff was entitled to recover one-third share in the lands.

Both parties appealed.

Shah, Ag. C. J.—[His Lordship held on the evidence that the suit land had not come to the Plaintiff's predecessor in interest under the sale deed of 1755 and after expressing concurrence with the trial Judge's view that the lands must be taken to have been acquired in any one of the ways in which such acquisition was possible proceeded:—] Though at this distance of time we may not know as to when and how these lands were acquired, it is clear that in any alienated village the Inamdar or the Saranjamdar has full right of disposal with reference to holdings which are either relinquished or forfeited for any valid reason. If the survey settlement has been extended to the alienated village, the holders of lands in the village would have the same rights and obligations as occupants in a Khalsa village. It is not suggested that the survey settlement was extended to the said village prior to the resumption. If it had been, the Khatedar would

clearly have the rights of an occupant under the Bombay Land Revenue Code as in a Khalsa village according to S. 217 of the Bombay Land Revenue Code. Whenever there is any relinquishment on any ground, or forfeiture of land for non-payment of the royal share of the revenue, the land would be at the disposal of the Saranjamdar, and he may dispose of it by giving the Mirasi or the occupancy right to any third person or by taking it up himself. It is also possible that the Mirasi or occupancy right would be acquired for consideration. It is true that in the present case the plea of purchase set up is not established, and, as no plea of any other purchase is put forward, that possibility may be left out of account. Then it is possible that the line of any family may become extinct; and there being no heirs, the Saranjamdar may take possession of the land. But in such a case his possession would clearly be wrongful. In that case the right would belong to the Crown as the ultimate heir of the deceased heirless person. That right forms no part of the Saranjam. Whether it be a Saranjam village or an Inam village, the right in such a case would belong to the Crown and to the Crown only in the absence of any statutory provision to the contrary. It is not suggested that there is any statutory provision on the point. A Saranjamdar who takes possession of any Mirasi or occupancy holding in this manner would hold it wrongfully and adversely to the Crown. As a possible mode of acquisition, it must be recognized; but I do not think that possibility can help us in the decision of this case, because if the Crown claim to have acquired a right to any of these lands on the ground that the holders died without leaving any heir, it must be alleged and proved. See *Gridhari Lal Roy v. The Bengal Government* (1) and *The Secretary of State v. Haibatrao Hari* (2). Without any proof of that plea with reference to any particular holding, the mere possibility of the lands being acquired in that way by the Saranjamdar could not help us in

(1) [1868] 13 M.I.A. 448=1 B.L.R. 44=10 W.R. 31=2 Suther 160=2 Sar. 382 (P.O.)

(2) [1903] 28 Bom. 276=6 Bom. L.R. 43.

this case. I refer to this circumstance because the learned counsel for the appellant has argued that it is possible that the Crown is entitled to the Mirasi or the occupancy right of these lands and that if that possibility is not excluded by the plaintiff definitely proving that the lands have been otherwise acquired, they must be treated as acquired in that wrongful manner by the Saranjamdar. Issue No. 2 no doubt has been framed in the terms in which these possibilities have been in the Commissioner's order and repeated in the plaint. But the learned Judge distinctly records his finding on that issue in the sense indicated in his judgment. I accept the finding in the sense indicated by the learned Judge in his judgment, subject to the reservation that really the occupation by the Saranjamdar of the lands, in those cases where the Crown would be the ultimate heir, would be wrongful, and that under the circumstances the fact that Raghunathrao was found to be the Khatedar in 1884 and 1886 must be attributed more reasonably to a legal origin, and not to a wrongful act on the part of the Saranjamdar. Even if it be assumed that the Saranjamdar would be entitled to the holding on the basis that the Mirasi right becomes extinct when the holder dies without heirs, and that there is no Mirasi right left, it is clear that the land would be in the same condition as any other land which has been relinquished; and the result would be same so far as the Saranjamdar's right to dispose of it is concerned. In that view of the matter, the other possibilities left are that the lands may have been acquired either in consequence of relinquishment on the part of the holders or in consequence of forfeiture for non payment of the royal share of the revenue or any other like cause.

[His Lordship then held that it was impossible to ascertain as to when and how the numbers in suit were acquired but that they had been in the possession of the plaintiffs and their predecessors in interest several years as Khatedars. After holding that neither adverse possession nor estoppel against the defendant was proved, his Lordship

referred to the admitted fact that the Saranjam in the case was a grant of the royal share of the revenue and not of the soil, and proceeded:—]

If it were a grant of the soil, the Government can resume the soil; and in that case the decision of their Lordships of the Privy Council in *Secretary of State v. Laxmibai* (3) would clearly apply. It is urged, however, that even in a case where the grant is of the royal share of the revenue, when the Government resume the grant, they are entitled not only to the royal share of the revenue, but also to such occupancy rights as the Saranjamdar may have acquired during the continuance of the grant for his own personal benefit. That is the argument which, it is urged by Mr. Coyajee, was advanced by Sir George Lowndes before their lordships of the Privy Council in *Secretary of State v. Laxmibai* (3) and that is the argument which is now urged before us. It may be mentioned that in that case the point decided was whether the Saranjam was a grant of the soil or of the royal share of the revenue on the facts of that case. It was decided that it was a grant of the soil, and on that basis the decision of this Court was overruled. A further question was raised in the arguments for the appellant in that case but it is difficult to say that the question which arises for our decision in this case was considered and decided in that case. Mr. Coyajee has not urged that the point that we have to decide is covered by the judgment of their Lordships of the Privy Council, but has suggested that the point which the learned counsel for the respondent in that case was supposed to have given up, was exactly the point which he now urges before us.

If I felt sure that that was the point given up I should practically accept it as decisive of the point. But it is not at all clear from the judgment that that was the point given up. The plaintiff in that case claimed in the alternative his right to

(3) 1923 P. O. 6—47, Bom. 327—50 I. A. 49—17 M. L. W. 405—33 M. L. T. 111—44 M. L. J. 471—25 Bom. L. R. 527—37 O. L. J. 464—28 C. W. N. 49 (P. O.)

hold the lands, whether the grant was of the royal share of the revenue or of the soil. Their lordships quote this clause from the plaint and refer to 'raitava rights' with regard to the occupation of lands which were unoccupied at the date of the grant. Then it is stated that the latter claim, *i. e.*, the claim with regard to the occupation of lands not occupied at the grant, was abandoned. This would apparently refer to the claim made in the plaint that even if it was a grant of the soil, the plaintiff would have a right to hold the lands. That point appears to me to have been given up.

Looking to the arguments of the learned counsel for the respondent as reported and to the judgment, I cannot say that it was considered and decided that even if it was a grant of the royal share of the revenue, the plaintiff could have no 'raitava rights' in the lands not occupied at the date of the grant. The principal point argued and decided in the case was whether the grant was of the royal share of the revenue only or of the soil. I read that judgment as deciding that where there is a grant of the soil all the rights of the occupancy which have accrued with reference to lands unoccupied at the date of the grant during the continuance of the grant must go with the grant as part thereof when it is resumed. But I am unable to read that judgment as deciding that even though it be a grant of the royal share of the revenue, any Mirasi or occupancy right howsoever acquired by the Saranjamdar over the land during the continuance of the grant must go with the grant when the grant is resumed. It is, therefore, necessary for us to consider whether, when the Government resume a grant, which is a grant of the royal share of the revenue, they can acquire the Mirasi or the occupancy right, which is a heritable and transferable right, in certain holdings, of which the Saranjamdar has become the Khatedar during the continuance of the grant.

I may mention that the lands in suit are stated on either side to be unoccupied lands at the date of the original grant, though it makes no

difference in the view accepted in this Court whether they were unoccupied or not. If in the case of unoccupied lands the Saranjamdar or Inamdar could acquire occupancy rights for his own benefit, *a fortiori* he could retain those rights, if acquired from others who had similar occupancy rights at the date of the grant.

The view taken by the Courts in this Presidency during the last fifty or sixty years has been that when the Government resume a grant of the royal share of the revenue, they can resume what they granted, namely, the royal share of the revenue and nothing more. In the case of *Saranjam*, it was so held in *Ganpatrav Trimbak Patwardhan v. Ganesh Baji Bhat* (4) by Sargent, C. J. and Mr. Justice Birdwood. A reference was made to the Government Resolution of May 27, 1854, in which the meaning of the word "resumption" was indicated. It is pointed out in that resolution that any person in the occupation of land will not be disturbed in his possession so far as he pays the assessment according to the revenue survey settlement, or in districts which have not been subject to the operations of a survey, according to the rights obtainable in the village in which the land is situated. According to this resolution it was held in *Vishnu Trimbak v. Tatia Pant* (5) that when the Government resume the Inam they can only resume the right to levy full assessment, and could not take possession of the land. After referring to the said resolution and the case of *Vishnu Trimbak v. Tatia Pant*, the learned Chief Justice observed as follows (p. 116):—

"In the present case we are concerned with a *saranjam*, and not an *inam*; but no legislative enactment or Government resolution has been cited in support of there being any difference between the tenures as regards the effect of resumption by Government."

In that very judgment at p. 117 of the report the observations of Mr. Justice Melvill in *Ramchandra v. Venkotrao* (6) that the "*saranjamdar* may deal with all unoccupied lands as may be best for the purposes of revenue, and may either cultivate them him-

(4) [1885] 10 Bom. 112.

(5) [1863] 1 B. H. C. R. 22.

(6) [1882] 6 Bom. 598.

self or through tenants" are referred to, and explained as meaning that the Saranjamdar may acquire occupancy rights, which remain unaffected by the resumption of the Saranjam except as to the assessment thenceforth payable to Government. This view was affirmed by Sargent C. J. and Nana-bhai Haridas, J. in *Hari Sarlashiv v. Shaik Ajmudin* (7).

There have been several cases with reference to Inams in which the view as to the effect of resumption as indicated in the Government Resolution of 1854 has been followed, and in the two cases above cited it has been held that if the grant be of the royal share of the revenue only there is no difference between a Saranjam grant and an Inam grant as to the meaning of 'resumption'. It is perfectly true that in the case of a Saranjam grant the Saranjamdar holds it for his life, and on his death the grant is liable to be resumed. That would not be so in the case of an ordinary Inam. But this distinction existed as much when the case of *Ganpatrav v. Ganesh* (4) was decided as it exists now and it could not have been ignored by the learned Judges who decided these cases. In fact the observations of Mr. Justice Melvill in *Ramchandra v. Venkatrao* (6) have been always understood in this Presidency as giving the Inamdar or Saranjamdar a right to use the land to his best advantage including the right to create occupancy or Mirasi rights in his favour, as forming part of his private property subject to the payment of assessment of the royal share of the revenue. It is only during recent years that with regard to Saranjams the correctness of this view has been questioned on behalf of the Government. It was questioned in the case of *Gururao Shrinivas v. Secretary of State* (8) which went up in appeal to the Privy Council, and in which the decree of this Court has been set aside.

In this Presidency there had been a long course of decisions on two distinct points, first, that in the absence of any evidence to prove that

the grant is of the soil, the presumption is that the grant is of the royal share of the revenue, and secondly, that in the case of a grant of the royal share of the revenue, it is open to the grantee to make the best use of the grant for his own benefit that is, to appropriate lands to his own use, subject to the payment of the royal share of the revenue, and to create rights of occupancy in his own favour, or in favour of third parties. Subject to the payment of the royal share of the revenue, all the rights in the land could be acquired by him and would belong to him, if so acquired; and the resumption of the grant would mean the resumption of what the Government granted, i. e. the royal share of the revenue, and not any other right which the grantee during the continuance of the grant could acquire for himself and for the benefit of his heirs. The decision in *Secretary of State v. Laxmibai* (3) and the other decisions of the Lordships of the Privy Council which have been referred to in that case, definitely overrule the view taken on the first point, relating to the presumption, as to the nature of the grant subject to the observations on that point in the judgment, namely that "it must be determined in each case upon the facts what was the quality of the original grant, although it may well be that it is ordinarily a grant of the royal revenue only" (p. 55). As regards the second point, as I read that judgment, there is no decision of their Lordships of the Privy Council; and we are left with the course of decisions of this Court on that point exactly as it was when the judgment in that case reported in 41 Bom. p. 408 was pronounced.

Apart from the decisions, it seems to me that on principle in the case of a grant of the Royal share of the revenue, when the grant is resumed all that the Government can fairly claim and would be entitled to, would be the royal share of the revenue. Whether the grant is in the nature of Saranjam or Inam, the grantee would be entitled to all the incidental benefits of the grant, namely, the right to acquire the occupancy rights in lands

(7) [1886] 11 Bom. 235.

(8) [1916] 41 Bom. 408—39 I. O. 65—19 Bom. L. R. 117.

either not occupied or held by others and forfeited on one ground or another or otherwise acquired from the holders. The mere fact that the Saranjamdar is in a sense a life tenant does not in my opinion, alter the ordinary incidents of a grant by way of Saranjam. The determination of the exact rights of a Saranjamdar appears to me to be more a question of the connotations of a Saranjam grant than of applying the analogy of a life estate, subject to all the limitations to which an ordinary life tenant could use such estate.

The course of decisions in this Presidency has been in favour of the view which I have already indicated and in the absence of any definite decision on the point to the contrary, it seems to me that that view should be followed in this case. I may mention that in *Balvant Ramchandra v. Secretary of State*, (9) decided by Sir Lawrence Jenkins, C.J. and Batchelor, J., it is pointed out (p. 437) that "since Melvill, J's judgment in 1882, the law in this Presidency has always been that a grantee of the revenue is entitled to make such profit as he can out of unoccupied lands" and a reference is made to the case of *Ganpatrav Trimbak Patwardhan v. Ganesh Baji Bhat* (4) and *Rajya v. Balkrishna Gan-gadhar* (10).

I refer to these observations to indicate how far a long time in this Presidency this has been the accepted view with regard to Inams and Saranjams. In 1854, when Government issued their Resolution under Act XI of 1852, the inquiries under that Act were not confined to Inams only, but related to other grants also. The preamble to the Act shows that the inquiries under the Act were contemplated with reference to claims against Government on account of Inams and other estates wholly or partially exempt from payment of land revenue; and the provision for making rules relating to Saranjams is to be found in that Act in clause 10 of Schedule B to that Act.

It has been urged on behalf of the appellant that the provisions of S. 90 of the Indian Trusts Act should apply

to this case. Under that section where a tenant for life, by availing himself of his position as such, gains an advantage in derogation of the rights of other persons interested in the property, he must hold, for the benefit of all persons so interested, the advantage so gained. It is no doubt true, as I have already stated that a Saranjamdar is in a sense a tenant for life. But during the continuance of the grant he occupies no fiduciary position with reference to the grantor or any other person: and it seems to me to be perfectly consistent with his life-estate to hold that the Saranjam grant gives him the right to make the best possible use of the lands in the village or of the occupancies that may come to be dealt with by him for his own personal benefit. His position is not exactly the position of that of a tenant for life. But even if it be, it seems to me, when he so uses the land for his own benefit, or acquires the occupancy and Mirasi rights in the land for his own benefit, he does not act in derogation of the rights of other persons interested in the property. The person interested in the Saranjam is the Government and the right of the Government is limited to the royal share of the revenue. If we take the successors to whom the Saranjam may be re-granted as persons interested, it does not derogate from their rights, which are limited to the royal share of the revenue. The acquisition of such personal rights of occupancy does not appear to me to be in derogation of the rights of others. The right of the Saranjamdar as such is limited to the royal share of the revenue, subject to the existing occupancies in the village, and it cannot be said that the Saranjamdar acts in derogation of the rights of others by acquiring occupancy or Mirasi rights for himself. In this view of the matter the English decisions which give effect to the principles underlying S. 90 of the Indian Trusts Act as regards tenants for life acquiring certain interests during their tenancy do not appear to me to apply to a Saranjam grant.

The learned counsel for the appellant has also relied upon the analogy

(9) [1908] 32 Bom. 432 = 10 Bom. L.R. 531.

(10) [1905] 29 Bom. 415 = 7 Bom. L.R. 439.

of S. 108 of the Transfer of Property Act so far as it relates to the rights and liabilities of a lessee. As regards this argument also, it seems to me that the real difficulty in the way of accepting it is that the analogy does not appear to me to be correct. A Saranjam grant carries with it certain incidental benefits to the grantee personally which an ordinary lease or a tenancy for life would not give.

It is necessary to add a word with reference to the rules made with regard to Saranjams by the Government in 1898. This particular Saranjam was resumed in 1892, after the death of Raghunathrao in 1889, and there were no rules then. But the rules as framed in 1898 do not in effect state anything more than what were ordinarily known to be the customary incidents of a Saranjam grant. There is nothing in the rules which is inconsistent with the view that in the case of a Saranjam grant of royal share of the revenue only the resumption could not mean anything more than the right to take the royal share of the revenue. Though the learned trial Judge decided this case at a time when he was not only entitled but bound to follow the decision in *Gururao Shrinivas*' case (8) which has now been reversed, even now it seems to me that the only course that we can adopt is to follow the course of decisions of this Court on this point quite apart from the view taken by this Court in *Gururao Shrinivas v. Secretary of State* (8).

[His Lordship then dismissed Appeal No. 245 of 1920 and allowed Appeal No. 251 of 1920 and varied the decree under appeal by deleting all references to one-third share of the plaintiff in the lands and directing that all reliefs granted to the plaintiff should operate fully in favour of the plaintiff without the limitation of the one-third share. This variation was to be without prejudice to the rights, if any, of the other co-owners in the suit lands.]

Fawcett, J.—[His Lordship addressed himself to the facts of the case and held that the suit lands came to be put in the name of the Saranjamdar or the plaintiff either on account of the line of Khatedars, who were previous tenants, becoming extinct, or a

tenant relinquishing his holding or his losing it by sequestration for non-payment of land revenue. His Lordship then continued :—]

I also agree with Mr. Coyajee that issue No. 2 is properly drawn on the pleadings. Paragraph 3 of the plaint puts up the alternative case that the land must have gone into the possession of the plaintiff's ancestors by reason of the extinction of the Khatedar's family or by reason of its resumption for arrears of assessment, and paragraph 4 of the written statement similarly refers to the Saranjamdar's right to hold lands that had passed into the possession and enjoyment of the family by the death of the Khatedar without leaving any heir or by forfeiture. In my opinion, therefore, the issue was properly based on these two methods of possible acquisition. But acquisition through the lands being relinquished by a tenant may, in my opinion, be held to be covered by this particular issue, as the acquisition of lands in this way is on a similar footing to acquisition by extinction or forfeiture. My learned brother is of opinion that the case of lands becoming vacant owing to the extinction of the line of any family that previously held it as *micasdars* is on a different footing to the case of lands acquired by relinquishment or forfeiture, and that in such a case the lands would escheat to the Crown and the possession of the Saranjamdar, if he took this land, would be wrongful. I do not myself think it necessary to decide this point in the present case, and I feel some doubt whether it would not be more correct to say that as the occupancy of the land would be only a limited interest, it would not escheat to the Crown, but revert to the grantor of the occupancy, i.e., the Saranjamdur: cf. *Tulshi Ram Sahu v. Gur Dayal Singh* (11). In any case it seems to me that there would be good ground for the contention that the Crown in such a case recognised the right of the Saranjamdar to dispose of the vacant lands in the same way as any other vacant land that might be in the village, just as in an unalienated village the Collector has

(11) [1910] 33 All. 111—7 I.O. 231—7 A.L.J. 1011 (F.B.)

power to dispose of the occupancy in such a case under S. 72 of the Bombay Land Revenue Code. Issue No. 2 covers not only the question whether the plaintiff proved that his ancestors so acquired the land, but whether they "became owners" thereof.

The only remaining point is the one, which in the lower Court led to issue No. 2 being answered in the affirmative and issue No. 6 in the negative, and which has been the main one argued before us. I shall first deal with this as if it were *res integra*, and give my opinion on the merits of the dispute untrammelled by any authority of this Court. The question is as to the excess profits over and above the assessment, which are obtained from these particular lands. This is the market rent which the Commissioner in his order Exhibit 5 directed the Collector to ascertain and recover from the plaintiff, or from the occupants, who had been put in possession by the plaintiff or his predecessor, the last Saranjamdar. In the case of the first five survey numbers (A) to (E) of the plaint, the average yearly income obtained by the plaintiff before the resumption is stated by the witness Exhibit 176 to have been Rs. 1,200, and in the case of the numbers shown as (H) to (K) which are still in plaintiff's possession, Government are said to have been exacting Rs. 112-6-0 more than they used to do. Some of the documents on record contain statements that part of the first five numbers, *viz.*, 2, 118, 119, 120 and 121, had in fact been actually sold by the last Saranjamdar to third parties for building houses, and other portions were leased on rent for the same purpose: see Exhibit 138, 152, 153 and 154. The Saranjamdar in fact obtained increased profits from these lands in the same way as a Collector obtains them where land assessed as agricultural land is subsequently diverted to non-agricultural purposes under Ss. 48, 65 and 66 of the Bombay Land Revenue Code. It also appears that a part of the remaining five numbers, which were not included in the village site, is

used for non-agricultural purposes; see Exhibits 138 and 143. The disposal of these particular lands in this way, *viz.*, upon the original occupancies being relinquished or extinguished, putting them in his own name and subsequently selling or leasing them for building or other non-agricultural purposes, is a disposal, which, in my opinion, is solely due to the Saranjamdar availing himself of his powers as Saranjamdar, which include not only a power to take the assessment, but also a power of management in regard to the village lands, enabling him to put unoccupied lands to the best possible use. The question is whether the advantage so obtained is one that is part of the Saranjam estate, which can be resumed by Government, or whether the Saranjamdar by his action in entering the lands in his own Khata acquires a private right to the occupancies, which cannot be resumed by Government, and which descend to his own heirs, although they may not succeed to the Saranjam grant. In my opinion, the answer to this question is that, the occupancies having been obtained by him *qua* Saranjamdar, and not in the exercise of any private mode of acquisition, such as a purchase from the original occupant, the occupancies must be treated as part of the Saranjam estate and liable to resumption by Government.

The case in fact seems to me to be practically on the same footing as if the Saranjamdar had alienated a part of the Saranjam estate by giving a permanent lease of these particular lands to a third party. It is, I think, indisputable that a sale of part of the Saranjam estate by a Saranjamdar is invalid as against his successor or Government as the reversioner, see *Gulabdas Juggivandas v. The Collector of Surat* (12), and it seems to me quite clear that where the Saranjamdar instead of selling the lands gives a permanent lease of them, by which his heirs get an increased revenue, the case is on the same footing as a sale: compare *Madhavrao*

(12) [1878] 3 Bom. 186 = 6 I. A. 54 = 3 Sar 889 (P. C.)

Waman v. Raghunath Venkatesh (13). I may also refer to *Nainapillai Marakayar v. Ramanathan Chettiar*, (14) where (in dealing with the case of a temple) their lordships say (p. 352) that "except in a case of such unavoidable necessity" (i. e., a necessity justifying an alienation) "the shebait, the managers or the trustees of a temple, or the mahant of a mutt have no power to sell or mortgage the endowed property in their custody, and obviously they have no right to impair the endowed property by creating or granting in favour of any one rights of permanent occupancy in the endowed lands." This principle seems to me to apply equally in the present case. I agree on this point entirely with the view taken by the learned District Judge, E. H. Leggatt, in the Hebli Saranjam case and cannot express it better than he has at page 32 of the paper book in the Privy Council Appeal No: 169 of 1913, viz., that "in the case of a Saranjam grant of land revenue the lands in the occupation of the grantee qua Saranjamdar are resumable with the Saranjam, though of course he may have possession of the land by purchase of occupancy rights from occupants at the time of the grant, in which case he would be in possession qua occupant and not qua Saranjamdar, or possibly in some other way he may have acquired a right to continue in possession." I agree also with his view that in the case of a Saranjam grant of land revenue, the grant of land revenue is coupled with the right to make the best possible use of unoccupied land, and presumably the whole of this can be resumed (page 31 of the paper-book). The first part of this proposition is also adopted by the District Judge in this case when he says in dealing with the sixth issue "it is not disputed that what the grant amounts to is that of the royal share of the revenue. But the grant also

connotes certain powers of management." He then goes on to illustrate what is meant by these powers of management. It is quite clear that, apart from his position as Saranjamdar, he would not be able to exercise these powers of disposal of lands on forfeiture, extinction of line or relinquishment, and as I have already mentioned, these are powers which are ordinarily reserved to a Collector under Ss. 57, 72 and 37 read with S. 74 of the Bombay Land Revenue Code. S. 111 impliedly recognises the exercise of such powers of management by an Inamdar of an Inam village, and the Courts have long ago recognised this power: see *Ramchandra v. Venkatrao* (6).

Then it is important to bear in mind that a Saranjam is a life estate and does not necessarily descend to the eldest lineal male heir: see Saranjam rules 2 and 5. As laid down by the Privy Council in *Sheikh Sultan Sani v. Sheikh Ajmodin* (15), the question to whom a Saranjam or Jaghir shall be granted upon the death of its holder is one which belongs exclusively to Government to be determined upon political considerations. It follows that the Saranjamdar is a 'qualified owner' and I adopt the contention of Sir George Lowndes in *Secretary of State v. Laxmibai* (3) that S. 90 of the Indian Trusts Act, 1882, applies. A Saranjamdar, by availing himself of his powers of management as Saranjamdar, cannot, in my opinion, gain for himself and his heirs an advantage in derogation of the rights of Government and his successors to whom Government may see fit to regrant the Saranjam, and who are "other persons interested in such property" within the meaning of S. 90. Even if the indeterminate successors cannot be considered, Government clearly have a reversionary interest which represents also the interests of future successors to the Saranjam estate and which cannot be ignored: compare *Madhavrao Waman v. Raghunath Venkatesh* (13), as to the corresponding interest and rights of the Crown in service watan lands. This principle merely follows

(13) 1923 P. O. 205 = 47 Bom. 798 = 50 I. A. 255 = 25 Bom. L. R. 1005 = 33 M. L. T. 389 = (1923) M. W. N. 689 (P. O.)

(14) 1924 P. O. 65 = 47 Mad. 337 = 51 I. A. 83 = 22 A. L. J. 130 = 5 L. R. P. O. 33 = 19 M. L. W. 259 = (1924) M. W. N. 293 = 34 M. L. T. 10 = 46 M. L. J. 546 = 28 C. W. N. 809 (P. C.)

(15) [1892] 17 Bom. 431 = 20 I. A. 50 = 6 Bar. 52 (P. C.)

the English law that a person holding a fiduciary position in relation to property cannot deal with the property for his own benefit, as to which reference may be made to Halsbury's Laws of England, Vol 28, page 48, Article 93, and to Lewin's 'Trusts,' 12th Edition, page 204. That principle covers the case of 'tenants for life' in relation 'towards those in remainder': cf *In re Biss: Biss v. Biss* (16), per Collins M. R. It seems to me that such a constructive trust clearly operates in the present case. The increased benefit gained by Sirdar Raghunathrao and subsequently by the plaintiff Shivdeorao was obtained by Raghunathrao having availed himself of his position as Saranjamdar and thus getting the occupancies for himself without any payment to the previous occupants, and the resulting revenues should be held for the benefit of the Saranjam estate under S. 90 of the Indian Trusts Act.

It is urged that, if Saranjamdar A could give a forfeited or relinquished occupancy to B or C, why should he not give it to himself? But this, in my opinion, overlooks the fact that, when A gives it to B or C, the latter is subject to various liabilities (over and above the mere payment of assessment), of which the Saranjamdar can take advantage in exercise of his powers of management. For instance if B or C uses the land for non-agricultural purposes, the Saranjamdar can levy an increased rental on the analogy of Ss. 65 and 66 of the Bombay Land Revenue Code. (Such increased assessment was in fact levied by the Saranjamdar Raghunathrao: cf. Exhibit 121 and 152). If this happens in the time of the successor of A, who gave the occupancy to B or C, such successor would benefit by it; whereas if A gives the occupancy to himself and the land is therefore treated as private property, A's heir D will get all the future benefit instead of A's successor as Saranjamdar, if the latter is not his heir. What happens in such a case is this that the Saranjamdar, instead of having a Mirasdar

or permanent tenant as the occupant, obtains the holding for himself, and can then deal with the land as his *Sheri* or private land: see *Rajya v. Balkrishna Gangadhar* (10). He thereby gets a decided advantage; for, instead of only getting the assessment or customary rent, which cannot be enhanced except within strict limits, he is able to get the market rent and in favourable conditions a rack-rent. In an ordinary case, where the Inamdar's heir is necessarily his successor as Inamdar, no question of trust arises. But where, as in the case of a Saranjam estate, the successor may not be the Saranjamdar's heir, or (as in this case) Government resumes the Saranjam, and there is no successor at all, the principle of S. 90 of the Indian Trusts Act comes into play. The advantage gained must be held for the benefit of the Saranjamdar's successors, or Government as the ultimate reversioner. The fact that the latter may still have left to them the benefit of the ordinary assessment is immaterial: cf. *James v. Dean* (17), which is summarized as follows in Lewin's 'Trusts' 12th Edition, para 4, at page 203.

"Even where a testator was possessed of leaseholds, and devised all his interest therein to A for life, remainder to B, and the lease having expired in the testator's life-time, he was at his death a mere yearly tenant, it was held that A, having renewed the lease, must hold it upon the limitations of the will, for the yearly tenancy was an interest capable of transmission by devise; and the tenant for life could not, by acting on the good-will that accompanied the possession, get the exclusive benefit of a more durable term."

In that particular case A's successors would still have got the yearly tenancy, but that did not prevent their being entitled to the more durable term, which had been obtained by A. To say that the Saranjamdar "occupies no fiduciary position" towards Government or any other person seems to me, with due respect, to beg the question. For the grant, in my view and that of Mr. Leggatt in the Hebli case, is a grant of land revenue coupled with a power of management, enabling him to make the best possible use of unoccupied land.

(16) [1903] 2 Ch. 40=88 L. T. 403=51 W. R. 504=72 L. J. Ch. 473.

(17) [1805] 11 Ves. 383.

There is, in my opinion, an implied or resulting trust that such powers shall not be exercised in a way that will benefit the Saranjamdar's heirs at the expense of future reversioners other than the Saranjamdar's own heirs; and to that extent I say he "occupies a fiduciary position" towards his successors and Government. Also I think a successor is entitled to receive not only the assessment, which is the main part of the Saranjam estate, but also the benefit of the increased profits obtainable from the power of management, which is part of the Saranjam grant. I say, therefore, that, in appropriating such profits for himself and his heirs, a Saranjamdar acts "in derogation of the rights of the other persons interested in the property," within the meaning of S. 90 of the Indian Trusts Act. Consequently I do not agree with the view of my learned brother that the power of resumption covers nothing more than the resumption of the right to take the royal share of the revenue. And even assuming that the grant is limited to a grant of the royal share of the revenue, I do not see why this should not cover any increase which, if the village was not alienated, the State could legitimately claim owing to agricultural lands being diverted to non-agricultural purposes as in the case of the lands that have been included in the village site of Manmad. S. 134 of the Bombay Land Revenue Code illustrates this right.

I would add that, with due deference, I demur to the view taken in *Sakharam Gopal v. Trimbakrao Ramchandraro* (18) that the Saranjamdar takes "an absolute interest in the subject matter of the grant." This view is based on *Dosibai v. Isavardas Jagjivandas* (19) which was a case of a Jaghir held on quite different terms to a Saranjam of the kind now in question, which is only a life-estate. It seems to me to be a contradiction in terms to speak of the Saranjamdar as an absolute owner in those circumstances. Nor do I agree

with the view taken at page 704 of the same case that a resumption under the rules is only 'formal.' It may be very real, as is shown by this case. In face of rule 2 of the Saranjam rules, how can it be said that the eldest lineal male representative is "entitled to succeed" as was said by Scott, C. J. in *Madhavrao Hariharrao v. Anusuyabai* (20). The rule distinctly says the contrary. Apart, therefore, from authority to the contrary, I would say that in view of this constructive trust issue (2) in the lower Court should be answered in the negative and issue (6) in the affirmative.

On the other hand I admit that the view taken above is opposed to contrary rulings by this Court, especially *Ganpatrav Trimbak Patwardhan v. Ganesh Baji Bhat* (4) and *Gururao Shrinivas v. Secretary of State* (8), which are both cases relating Saranjams. The decision of the Privy Council on appeal from the last named case in *Secretary of State v. Laxmibai* (3), has not, I think, definitely overruled the view taken by this Court in *Gururao's* case (at page 433) to the effect that, where the Saranjam grant is a grant of the royal share of the land revenue, the Government cannot resume anything but that royal share, and that the right to the occupation of the land subject to the payment of the assessment can and does survive the resumption of the Saranjam. I do not agree with the view of my learned brother that the point referred to in the judgment of the Privy Council in *Secretary of State v. Laxmibai* (3) as having been "abandoned" before them apparently refers to the claim made in the plaint in that case that, even if it was a grant of the soil the plaintiff would have a right to hold the lands. The phrase "raitava rights" in the passage quoted by their lordships from the plaint in that case occurs in direct conjunction with the contention that "Saranjam grant is a grant of the revenue only" and when the Privy Council speak of a "claim of this kind," they presumably refer to the claim made on that basis. It

(18) [1921] 45 Bom. 694=61 I.O. 40=23 Bom. L.R. 314.

(19) [1891] 15 Bom. 222=18 I. A. 22=6 Sar. 10 (P.O.)

(20) [1916] 40 Bom. 606=36 I.O. 505=18 Bom. L.R. 768.

appears in fact that such a claim was asserted only on that basis both in the District Court and the High Court. Thus in the District Judge's judgment at page 28 of the Privy Council record, line 20, it is said, "It is practically conceded that the grant in this case was of land revenue and not of the soil," and his findings at page 35, lines 36 to 41, and at page 40, paragraph 26, are on this basis. In the High Court the contention was put forward on the same basis (see the Privy Council record, page 90, lines 34 *et seq.*) and the discussion of it proceeded only on that basis (*cf.* page 95, lines 40 to 45, and page 97, lines 13 to 17, and lines 39 to 42). When the Privy Council say "this latter claim has now been abandoned" they surely can only mean the claim made on that basis. This is corroborated by the report of the arguments for the respondent before the Privy Council as reported in L. R. 47 Bom. at page 331. This contains the argument: "If the grant was merely of the revenue, the plaintiffs have the right to possession, although the Government can reassess." Sir George Lowndes met this by pointing out that the District Judge had found that there was no right of occupancy (i. e., presumably the finding on the ninth issue,) and he added that in the High Court it was not contended that that finding was wrong. I think this latter statement is erroneous, for clearly the High Court found that on the basis of the Saranjam grant being a grant of the royal share of the revenue, the plaintiffs had a valid right to the occupancy, which could not be disturbed by Government.

But this view may not have occurred to the learned counsel for the respondent, and it may have been on this account that the claim under consideration was abandoned by him. In any case an abandonment by counsel of this particular contention cannot, in my opinion, be taken as conclusive in the present case, or as adequate basis for holding that the Privy Council have decided against the view taken in *Gururao's* case which I have already mentioned.

Therefore, merely on the ground that I am bound by previous decisions of this Court, though I differ from these decisions on the merits so far as they affect the present case I agree to the findings on issues Nos. 2 and 6 arrived at by my learned brother and in the decree that he proposes to make, based on these findings. Otherwise I should have dismissed the plaintiff's suit with costs throughout. I also concur in allowing Appeal No. 281 of the plaintiff as regards the form of the decree. I think the principle followed in *Gangaram v. Bapusaheb* (21) applies to this case, and that the plaintiff should get possession of the suit lands, if she succeeds in the suit, subject to any rights of co-sharers therein. The case is one where the plaintiff as the principal co-sharer can, I think, legitimately sue alone to eject an alleged trespasser: *cf.* *Shutan v. The Magnesite Syndicate, Ltd.* (22).

No doubt the defendant might have objected to the other co-sharers not being joined as parties to the suit, *cf.* *Balkrishna Moreshwar Kunte v. The Municipality of Mahad*; (23) but no such objection was taken (although the Court appears to have suggested their joinder), and it must accordingly, under Order I, rule 13, of the Civil Procedure Code, be deemed to be waived.

Decree varied.

(21) 1922 Bom. 354=46 Bom. 1022=24 Bom. L.R. 826.

(22) [1915] 39 Mad. 501=2 L.W. 460=17 M. L.T. 387=29 I.C. 69=28 M.L.J. 598.

(23) [1885] 10 Bom. 32.

1925 BOMBAY 209

SHAH AND COYAJEE, JJ.

Laxman Bobling Gurus—Original Plaintiff—Appellant.

v.

Vishram Mahadev Rane—Original Defendant—Respondent.

Appeal from Appellate Decree No. 419 of 1922, Decided on 12th June 1923, against the decision of D. J., Ratnagiri, in appeal No. 63 of 1921.

C. P. Code, S. 9—Suit chiefly with respect to the right to receive offering and incidentally to the right to worship is maintainable.

Plaintiff sued for an injunction permanently restraining the defendant from obstructing him in worshipping the deity in question, in doing every other business in connection with the deity and appropriating the profits at the temple of the deity, on the basis that he was entitled to all those rights to the exclusion of the defendant.

Held: that there was a dispute between the plaintiff and the defendant as to the right to the property which consisted of Voluntary offerings made before the deity, and that is the property with reference to which the right was to be determined, hence the suit is maintainable. It is quite clear that there is a contest substantially as to the property, and incidentally as to the right to perform the worship at the temple which is connected with the right to take the offerings. (P. 209, C. 2; P. 210, C. 1)

Patwardhan with Pilgaumker—for Appellant.

Thakor with Kane—for Respondent.

Judgment.—In this case the plaintiff sued for an injunction permanently restraining the defendant from obstructing him in worshipping the deity in question, in doing every other business in connection with the deity and appropriating the profits at the temple of the deity, on the basis that he was entitled to all those rights to the exclusion of the defendant. The defendant's case was that the plaintiff was merely his servant, and that the plaintiff had no right as alleged by him. He further pleaded that as Mankari he was entitled to all the rights that the plaintiff claimed in connection with this temple.

Among the issues raised on those pleadings the 1st issue is in these terms: "Is plaintiff a rightful worshipper of the deity? And is he entitled to appropriate the income available at the temple as alleged? The

trial Court found this issue in favour of the plaintiff, and after dealing with the other issues as to whether a suit of this character was maintainable under S. 9 of the Civil Procedure Code, and as to whether any obstruction was caused by the defendant to the plaintiff in the enjoyment of his rights in 1919 as alleged, and as to whether the suit was in time, the Court passed a decree in favour of the plaintiff in the following terms:—"I declare that the plaintiff is entitled to worship the deity Ninabai, to consult

" at the temple of Ninabai, to do all other work in connection with the deity and to appropriate the profits at the temple and grant the permanent injunction restraining the defendant from obstructing the plaintiff in the enjoyment of his rights". Rs. 5 as damages and future mesne profits at the rate of Re. 1 per month were also allowed.

The defendant appealed to the District Court. The learned District Judge amended the decree by deleting from the decree the declaration that 'the plaintiff was entitled to appropriate all profits in the temple, the award of damages and future mesne profits'. In doing so the learned Judge did not come to any conclusion on the 1st issue as to whether the plaintiff was the rightful worshipper, and was entitled to appropriate the offerings at the temple. The learned Judge thought that the plaintiff was not in any sense the manager or the superintendent of the temple to the exclusion of others. Having regard to the pleadings and the way in which the case has been dealt with by the trial Court, it appears that really the case of the plaintiff was that he was the rightful worshipper, and that he had the right to look after all the concerns of the temple over and above taking the offerings at the temple.

It has been faintly argued before us that such a suit is not maintainable. We think that there is a dispute between the plaintiff and the defendant as to the right to the property which consists of voluntary offerings made before the deity. That is specifically referred to in the plaint, and that is the property with reference to which the right is to be determined.

Such a suit appears to be clearly maintainable. In the present case it is quite clear that there is a contest substantially as to the property, and incidentally as to the right to perform the worship at the temple which is connected with the right to take the offerings. The respondent's contention that the suit is not maintainable must be disallowed.

It is unfortunate that the lower appellate Court has not recorded a finding on the first issue in the case in the trial Court. That Court found in favour of the plaintiff, and there is no finding of the lower appellate Court on the point. We do not think that under the circumstances of this case we can determine this question of fact for ourselves as we are entitled to do. For a satisfactory disposal of this appeal we think it is necessary to have a distinct finding on that issue. We therefore send back the case for a finding on issue No. 1 as framed in the trial Court. Finding to be certified to this Court in two months. There will be no further evidence.

Appeal allowed.

Case remanded.

★ ★ 1925 BOMBAY 210

(FULL BENCH)

SHAH, AG. C. J., MARTEN, FAWCETT,
MULLA AND KINCAID, JJ.

Atmaram Sakharam Kalkye—Plaintiff—
Appellant.

v.

Vaman Janardhan Kashelkar—De-
fendant—Respondent.

Appeal No. 7 of 1923, Decided on 17th October, 1924, from an Order passed by First Class, Sub J., Ratnagiri, in Appeal No. 224 of 1921.

★ ★ *T. P. Act, Ss. 123 and 126—Deed duly executed—Donor cannot revoke before registration 1924 Bom. 434—Overruled.*

Per Full Bench (Shah Ag. C. J. and Mulla, J. dissenting).—After a deed of gift of immovable property has been duly executed and attested by the donor and accepted by the donee it is not competent to the donor to revoke the gift though the deed may not have actually been registered at the time. 1924 Bom. 434=48 Bom. 425 *Overruled* law elaborately discussed.)

Shah, Ag. C. J.—The facts which have given rise to this appeal are these:—

Plaintiff No. 1, Sakharam Keshav Kalkye, executed a deed of gift in favour of defendant No. 1 on September 17, 1917

in respect of his several movable and immovable properties. At that time plaintiff No. 1 had no son. Soon after this deed of gift, defendant No. 1 attempted to go and live with plaintiff No. 1. There was a dispute between the parties and criminal proceedings were initiated on September 30, 1917, by plaintiff No. 1 against defendant No. 1 for criminal trespass. The deed was presented for registration by defendant No. 1 on September 26, 1917, but plaintiff No. 1 did not appear before the Sub-Registrar and the Sub-Registrar refused to register the deed, on October 3, 1917, treating the conduct of plaintiff No. 1 as being equivalent to a denial of the execution of the document. Defendant No. 1 appealed to the Registrar. During the course of the hearing before the Registrar plaintiff No. 1 appeared but resiled from his action and denied execution. The Registrar ordered it to be registered in November 1917 and accordingly it was registered on December 18, 1917. Subsequently plaintiff No. 1 adopted plaintiff No. 2 and both of them filed the present suit on August 7, 1920, to set aside the deed of gift and for possession of the property described in the plaint, alleging that the deed of gift was invalid and that it was fraudulently obtained from plaintiff No. 1 who was a weak-minded man. Defendant No. 1 pleaded that plaintiff No. 1 had executed the deed willingly and with full knowledge of the contents of the document and that it was not obtained by any undue influence or in a fraudulent manner and that as the deed was registered, the gift was valid. On these pleadings issues were framed, but after examining the parties, the trial Court framed a preliminary issue in these terms: "Is the gift deed valid as its registration took place without the consent of the donor?" The learned trial Judge found in the negative on this issue and also recorded findings on issues Nos. 3 and 5. Issues Nos. 1 and 3 related to the adoption of plaintiff No. 2 with which we are not concerned. But as a result of the finding on the preliminary issue the learned Judge held that the plaintiffs were entitled to cancel the deed of gift and accordingly passed a decree in favour of the plaintiffs.

Defendant No. 1 appealed. The First class Subordinate Judge with appellate powers found that the deed of gift relied upon by the defendant was not invalid on

the ground of the absence of consent of the donor to its registration. He accordingly reversed the decree of the trial Court and remanded the suit for trial on the merits.

The plaintiffs have appealed to this Court from this order of remand. It is urged in support of the appeal that it is not merely a question of want of consent to the registration on the part of plaintiff No. 1 and that in fact it is a case of revocation of the gift before the document was registered. In support of this his conduct immediately after the deed is relied upon as showing that it indicated revocation of the gift on his part. Further it is urged that it was competent to plaintiff No. 1 to revoke the gift before it was completed, and that the gift would not be complete until the document was in fact registered whether with or without the consent of the donor. In support of this contention reliance is placed upon the decision in *Subba Rama v. Venkatsubba* (1).

On behalf of the respondents it is urged that plaintiff No. 1 did not in fact revoke the gift, that it was not competent to him to revoke it, and the fact that the document was ultimately registered makes it effective as from the date of the document, that is, from September 17, 1917. Several decisions have been relied upon by Mr. Shingne in support of the contention that the consent of the donor to the registration is in no way essential and that the registration, when it is effected in accordance with the provisions of the Indian Registration Act, whether with or without the donor's consent, becomes effective against the donor. The decisions relied upon in support of this proposition are *Khashaba v. Chandrobhagabai* (2), *Parbati v. Baij Nath Pathak* (3); and *Venkata Rama Reddi v. Pillati Rama Reddi* (4). In addition to these cases I may also refer to the decision in *Bhabatosh Banerjee v. Soleman* (5) and the differing judgments in *Parbati v. Baij Nath Pathak* (3) which were considered in appeal in *Parbati's case*. As regards the decision of this Court in *Subba Rama v. Venkatsubba* (1) it is contended by Mr. Shingne that it

does not lay down the law correctly, and that the *ratio decidendi* of that case is not consistent with the reasoning underlying the other cases above referred to and that the question as to whether it is competent to a donor to revoke the gift before the document is registered may be considered by a Full Bench.

As regards the first question as to whether in fact this is merely a case of not consenting to the registration or a case of real revocation of the gift before the document was in fact registered, we have come to the conclusion that it is a case of revocation, before the document was in fact registered. This position was not seriously challenged by Mr. Shingne though not conceded. The criminal proceedings which were immediately initiated by plaintiff No. 1 and also his refusal to consent to registration clearly indicate that he wanted to revoke the gift and did in fact do so. I may mention that in the lower Courts this question has not been considered. The case has been considered on the basis whether the absence of the donor's consent to registration is sufficient to invalidate the gift. If it were merely a case of absence of such consent, I should not feel any difficulty in following the current of decisions above referred to. But when the donor goes further than merely withholding his consent to registration so as to justify the inference of revocation before actual registration, a difficult question arises, viz., whether the revocation is effective in law in view of the fact that the document has been subsequently registered.

"Gift" is defined by S. 122 of the Transfer of Property Act, and S. 123 provides that for the purpose of making a gift of immovable property, the transfer must be effected by a registered instrument signed by or on behalf of the donor and attested by at least two witnesses. In the present case the instrument was executed on September 17, 1917, and the gift would be complete when the document is registered. If the gift is not complete until the document is registered, it is clear to my mind that it would be open to the donor to revoke it before registration. An incomplete gift can, of course, be revoked by the donor at any time: see *Standing v. Bowring* (6). In the words of Batty J. in *Joitaram v. Ramkrishna* (7) "the essential

(1) 1924 Bom. 494=48 Bom. 435=26 Bom. L. R. 427.

(2) [1908] 31 Bom. 441=10 Bom. L. R. 536.

(3) [1912] 35 All. 8=14 I. C. 61=9 A. L. J. 800

(4) [1916] 40 Mad. 204=31 M. L. J. 690=4 L. W. 465=20 M.L.T. 450=38 L.C. 707=(1917) M.W.N. 112.

(5) [1906] 33 Cal. 584=4 C.L.J. 340=10 G. W. N. 717.

(6) [1885] 31 C.L.D. 252=55 W. J; Oh. 218=54 L. T. 191=34 W.R. 204.

(7) [1902] 27 Bom. 31=4 Bom. L. R. 754.

to the validity of a gift seems to be...that donor should have done all he could do to complete the gift." The gift would be incomplete so long as registration is not effected. It is quite true that the law of registration does not require that the executing party must be a consenting party at the time of registration. It may happen at the time of registration, according to that law, that either the donor's consent may be given on his behalf by some one else or registration may be ordered in spite of his not consenting to the registration. These positions are possible under the Indian Registration Act. All that the cases which I have referred to decide is that it is not essential to the validity of the gift of immovable property that the registration of the deed by which such gift is effected should be either at the instance of or with the consent of the donor. That was the only point decided in *Parbati v. Baij Nath Pathak* (3). In *Venkata Rama Reddi's* case (4) the question decided by the Full Bench was whether a deed of gift registered by the donee after the death of the donor without the consent of the legal representative of the donor was valid. That is practically the point decided in *Khashaba v. Chandra-bhagabai* (2) and in effect nothing more is decided in *Bhubatosh Banerjee v. Soleman* (5). I accept the conclusion reached in these cases that it is not essential to the validity of a gift of immovable property, to which S. 123 of the Transfer of Property Act applies, that registration should be effected with the consent of the donor. But I do not think that the question whether the donor can revoke the gift before the document is in fact registered arose or was considered in any of these cases. The question was considered by this Court in *Subba Rama v. Venkatasubba* (1) and it was held that until the document was in fact registered the gift was inchoate and that it was open to the donor to revoke it before it was completed by registration. It is true that in that case the deed was not in fact registered before the dispute arose: and to that extent it can be differentiated from the present case. The question is whether the ordinary rule applicable to the law of gift that until the gift is completed, it is open to the donor to revoke it is in any way affected by the provisions of the Indian Registration Act under which it is possible that the document can be registered without the consent

of the donor at the time of the registration. I do not think that it would be right to apply the provisions of the Indian Registration Act in that way to the rules relating to the law of gift. It is a statute relating to the registration of documents generally, and has no direct connection with the law of gift. When the law provides that a gift of immovable property can be effected only by a registered instrument, the stage of completion of the gift is marked by the actual registration. Up to that time it is open to the donor to revoke the gift. It does not matter to my mind whether registration in fact is ordered at the instance of the donor or against his wishes. It is open to the donor to revoke the gift before it is complete, and it is difficult to see how that rule can be affected by the mere fact that registration is possible according to the Indian Registration Act without the consent of the donor, and further that registration, when it is effected, makes the document effective as from the date of its execution. In such cases the question must be whether the donor has merely withheld his assent to the registration or has gone beyond that stage and revoked the gift. Where he has merely withheld his consent and has done nothing more to indicate that he revokes the gift, the cases which I have already referred to would apply. But where he goes beyond that stage and indicates a clear intention on his part to revoke the gift the revocation should be and would be effective despite the fact that registration is subsequently ordered according to the rules of the Indian Registration Act. It is quite true that in *Subba Rama v. Venkatasubba* (1) the act of revocation was absolutely unequivocal and beyond question. In the present case it is not so clear. The present suit was filed long after the registration was in fact effected. But the principle is the same as to whether it is open to a donor to revoke a gift before the document is in fact registered. If it is open to a donor to revoke the gift before registration, it must be determined on the circumstances of each case whether in fact he has revoked it before that stage is reached. In the present case the lower Courts have not appreciated this difference between revocation and mere absence of consent to registration. The difference would be real in many cases; and the question of law that arises for consider-

ation in this appeal is of practical importance. I find it difficult to hold that the *ratio decidendi* in *Subba Rama v. Venkatasubba* (1) conflicts with the other cases I have referred to in this judgment. But there are observations in the various judgments indicating that the power to revoke before registration would be ineffective when the document is in fact registered and takes effect according to the provisions of the Indian Registration Act as from the date of its execution. This point was not considered and decided in *Subba Rama's* case, (1) but the *ratio decidendi* of that case is in favour of the view that it is open to the donor to revoke the gift, and that the revocation cannot be affected by the subsequent registration of the donee contrary to the wishes of the donor. Under the circumstances I think that the following questions should be referred to a Full Bench for decision:—

(1) Was it competent to the donor to revoke the gift of immovable property before the instrument was in fact registered?

(2) If so, whether the subsequent registration of the document against the wish of the donor makes the revocation ineffective?

Fawcett, J.—In my opinion there is a conflict of view, which vitally affects the decision of this appeal. The first view is that, when an intending donor has executed a deed of gift, attested by at least two witnesses, he has (so far as he is concerned) done all that he need do towards completing the gift, inasmuch as the subsequent registration can be effected without his co-operation and even against his consent: therefore the doctrine that a donor can revoke an incomplete gift has no application to such a case, and he has no *locus pœnitentiæ* between the time of execution of the document, and the time of its registration.

This view has, it seems to me, been clearly adopted by the High Courts of Madras and Allahabad in *Venkata Rama Reddi v. Pillati Rama Reddi* (4) and *Parbati v. Baij Nath Pathak* (3). Both of these cases dissent from *Ramamirtha Ayyan v. Gopala Ayyan* (8), where the exact point now before us arose, as stated in the passage from the lower Appellate Court's judgment which is cited at p. 434, and both of these decisions hold that the law was not correctly laid down in that

case. The Allahabad decision also expresses agreement with the judgment of Chamier J., who expressly rejected this theory of the donor having a *locus pœnitentiæ* prior to registration of the instrument: see *Parbati v. Baij Nath Pathak* (3).

Though the remarks on the point are perhaps *obiter dicta*, yet the following passage from Batchelor J.'s judgment in *Khashaba v. Chandrabhagabai* (2) distinctly favours the same view (p. 444):—

"It must be remembered moreover that here the donor had done all that it was required of him to do in order to make the gift, and the subsequent registration could have been effected without any co-operation on his part. Further, the deed of gift was registered afterwards, and on registration it operated as from the date of execution; and this, we think, is an answer to the technical objection that there was no acceptance of a registered instrument."

The second view is that adopted by this Court in *Subba Rama v. Venkatasubba* (1) and the Madras High Court in the overruled case of *Ramamirtha Ayyan v. Gopala Ayyan*, (8) viz., that the gift is incomplete until the deed has been registered, and the donor can revoke the gift prior to registration.

There being thus two contrary views adopted by different Benches of this Court, and the point being of general importance, I think it should be referred to a Full Bench and I concur in the reference proposed by the learned Chief Justice.

I am inclined at present in favour of the first view. It seems to me that, when the donor has executed a deed, which will be effectual to vest the gift in the donee if it is registered and if the donee accepts the gift, then the stage of an inchoate or incomplete gift has been passed, registration being a subsequent operation independent of his consenting to it. It is an entirely different case to one of a gift resting merely in promise or unfulfilled intention, which under English law can be revoked at any time: cf. Halsbury's Laws of England, Vol. XV, Article 852 at p. 428. I also think that, if the legislature had intended that a donor should have such a *locus pœnitentiæ*, provision would have been made for it, before saying in S. 126 of the Transfer of Property Act, 1882, "save as aforesaid, a gift cannot be revoked." I do not think the

(3) [1896] 19 Mad. 438=8 M.L.J. 207.

argument used in *Subba Rama v. Venkatasubba* (1) that a donor can revoke a gift which is not accepted by the donee and is therefore an inchoate gift, is conclusive against the application of S. 126 to an incomplete gift in the sense of a gift by an instrument which has not been registered. English law lends no support to the view that a donor can revoke a gift that is otherwise complete, before the donee knows of it and accepts it: the case of *Standing v. Bowring* (6) in fact decides that he cannot. So far as I am aware, there is no authority to the contrary in India: and therefore the statement of Macleod, C. J. that "if the donee has not accepted the gift, clearly it is not complete, and the donor can revoke it" is open to serious criticism: cf. Halsbury's *Laws of England*, Vol. XV, Article 830 at p. 418. But even supposing S. 126 refers only to complete gifts, in the sense of gifts fully effected in the manner stated in S. 123, my present opinion, for the reasons already given, is that there is no *locus paenitentiae* for the donor between execution and registration. I may add that under English law a deed of gift, which has been formally sealed and delivered, cannot ordinarily be revoked, even though it still remains in the possession of the executing party. (Halsbury, Vol. XV, Article 831 at p. 418). In the present case the donor went further and handed over the instrument to defendant No. 1, who presented it for registration. It is not, therefore, a case, where it can be said the donor omitted to do anything which was necessary to be done in order to transfer the property and render the gift binding upon him, to use the language of Turner, L. J. in *Milroy v. Lord* (9) cited in *Behari Lal Ghose v. Sindhubala Dasi* (10). It might have been different, if he had not parted with possession of the instrument, for in that case it could not have been presented for registration without his consent. The necessity supplies a reason for saying that the English rule mentioned at the beginning of this paragraph cannot properly be applied in India.

I agree with my learned brother that in the present case the evidence clearly shows that the donor revoked the gift

before the document was registered, and as to the form of the two questions to be referred to the Full Bench for decision.

[The judgment of the Full Bench was as follows:—]

Shah, Ag. C. J.—The questions arising on this reference have been fully and ably argued on both sides. I have already indicated in my referring judgment the view to which I was inclined then, and my reasons for that view. It is not necessary to repeat the facts. I have considered the arguments on both sides and after giving my best consideration to the arguments, my opinion is that question No. 1 should be answered in the affirmative, and question No. 2 should be answered in the negative.

I shall briefly state my reasons for this view in the light of the arguments which have been urged before us. Chapter VII of the Transfer of Property Act deals with gifts, and S. 122 defines "gift" as "the transfer of certain existing moveable or immoveable property made voluntarily and without consideration by one person, called the donor, to another, called the donee and accepted by or on behalf of the donee." It further provides that "such acceptance must be made during the life-time of the donor and while he is still capable of giving. If the donee dies before acceptance, the gift is void."

S. 123 provides that "for the purpose of making a gift of immovable property, the transfer must be effected by a registered instrument signed by or on behalf of the donor, and attested by at least two witnesses." In the case of moveable property, the transfer may be effected by a registered instrument signed as aforesaid or by delivery.

In the present case, we are concerned with a gift of immovable property and it seems to me to be the clear effect of these two sections that until the document is registered the gift is incomplete in law even though the other two conditions as to the instrument being duly signed and attested and as to acceptance are satisfied. The essentials of a completed gift, according to these sections, appear to be that a transfer of the property is made voluntarily and without consideration by an instrument which is signed by or on behalf of the donor, and attested by at least two witnesses, and which is registered, that is, registered in British India under the law for the time

(9) [1862] 4 De. G. F. & G. 264=31 L. J. Ch. 798=8 Jur. (n. s.) 806=7 L. T. 178.

(10) [1917] 45 Cal. 434=22 C. W. N. 210=41 I. C. 878=27 C. L. J. 497.

being in force regulating the registration of documents, and that it is accepted by the donee. Until all these conditions are fulfilled, according to my reading of the sections, the gift is incomplete.

To illustrate my meaning with reference to the essential nature of registration to complete a gift, I may put it in this way. If a document has been executed by the donor, and attested by two witnesses, and delivered to the donee, but neither party takes the trouble to get it registered according to the provisions of the Indian Registration Act, and the document remains unregistered, the gift, in my view, is incomplete, and does not take effect. The donor continues to be the owner and the donee would have no rights in the property even though the instrument is duly signed and attested and though the transfer is accepted by the donee.

The next step which I take is that so long as the transfer is incomplete, it is open to the donor to resile from it, and to cancel what he may have done. The gift, in my view, is incomplete according to law so long as the document is not registered, and it is open to the donor to revoke it before it is complete. It is a recognised rule of the law of gift that before the gift is complete the donor can revoke it. As to when the gift can be said to be complete must necessarily depend upon the law of the land. For instance, before the Transfer of Property Act, according to the view taken in this Court the transfer of possession was considered essential to complete a gift by a Hindu, and where transfer of possession is essential, the gift would be revocable, in spite of the delivery of any written instrument to the donee before the transfer of possession is effected. Similarly, after the Transfer of Property Act, the necessity of transfer of possession to validate a gift is dispensed with, but the necessity for an instrument in writing signed by the donor and attested by two witnesses, and registered according to the provisions of the Act, is laid down. It may be mentioned that whatever be the necessity for the transfer of possession in order to complete a gift by a Hindu before the Transfer of Property Act, the requirements of a valid gift after the Act came to be applied to this Presidency have to be determined with reference to the provisions of the Act. It is hardly necessary to refer to any authority on this point as the effect of the provi-

sions of the Act is clear. I may mention that in *Bai Rambai v. Bai Mani* (11) this effect has been clearly pointed out.

In the present case, therefore, we are not concerned with the question as to whether possession of the property has been transferred or not. But we are concerned with the question as to whether there has been a transfer of property within the meaning of the Transfer of Property Act. In S. 5 "transfer of property" is defined. I may also refer to S. 9, upon which Mr. Shingne has relied, as indicating that a transfer of property may be made under the Act without writing in every case in which a writing is not expressly required by law. But in the case of a gift a writing is required by law as stated in S. 123, and it is also required to be registered.

I have already stated my reasons in the referring judgment for the proposition that an incomplete gift can be revoked by the donor at any time, before it is completed; or, if the use of the word 'revoke' appears inapt with reference to an incomplete gift, I would say that the donor can cancel the transaction before the transfer is effected to constitute a complete gift. The question is whether until the document is registered the gift can be said to be incomplete in the sense that it leaves the power of revocation in the donor unaffected. It is urged by Mr. Shingne for the respondents that the donor's power to revoke is at an end as soon as he has executed a document, attested by two witnesses, and delivered it to the donee, and it is accepted by the donee, that the act of registration does not necessarily depend upon the volition of the executant according to the provisions of the Indian Registration Act, and that the donor having done all that he need do according to law, his power of revocation is at an end. Though there has been a somewhat elaborate discussion of the provisions of the Indian Registration Act, in my view of the case, it is not necessary to deal with the provisions of the Act in detail. It is clear under the provisions, and I readily accept the proposition, that for the purposes of registration, under the Indian Registration Act, it is not essential that the document should be presented by the executant for registration, or that he should be a consenting party to the registration. The document could be presented by any person satisfying the

requirements of S. 32 of the Indian Registration Act, that is, by a person executing it or by any person claiming under the document. It is also clear that registration may be effected even though the executant does not consent to registration.

The question to my mind is whether the provisions of the Indian Registration Act as regards registration can affect in any way the law which would govern transactions by way of gift, or they simply regulate the registration of the document when presented for registration. The provisions of the Transfer of Property Act, as contained in the definition in the word "registered" in S. 3, and in S. 4 of the Transfer of Property Act, have no effect upon the power of the donor to revoke the gift up to a certain stage which exists independently of the provisions as to the necessity for registration of deeds of gift. I do not think that by making these provisions relating to documents requiring to be registered supplemental to the provisions of the Indian Registration Act, the legislature could have meant to lay down anything more than this, that those documents were compulsorily registrable, though all of them may not require to be registered under the Indian Registration Act. The provisions of the Indian Registration Act, as I understand them, do not and cannot affect the question as to when the power of the donor to put an end to an incomplete gift ceases.

In determining the question under the Indian law, it seems to me that all technical rules of English law relating to deeds and delivery of deeds should be left out of consideration. At least they cannot help us in determining this question. In my opinion the question must be determined with reference to the Indian law which is to be found for the purposes of this case in the Transfer of Property Act. The execution of the instrument and the delivery thereof without registration would not have the effect of effecting the transfer or of completing the gift.

I may refer to S. 126 of the Transfer of Property Act, upon which reliance has been placed on behalf of the respondents as indicating that a gift cannot be revoked except as provided in that section. That is perfectly true. But that applies to a case of a completed gift. It does not purport to lay down any rule as to the rights and powers of the donor before the state of completion is reached.

Reference was made in the argument to the consideration that though in the case of sales and mortgages documents are required to be registered, it is not suggested that the executants would have power to revoke up to the time of actual registration. The argument based on the analogy does not, however, seem to me to be well-founded. It is perfectly true to say, with regard to those documents, as with regard to a deed of gift that the sale is not complete or that the mortgage is not complete until the document is registered, just as a gift would not be complete until the document is registered. But the vendor who has agreed to sell the property and has executed a conveyance not registered or a mortgagor who has executed an instrument duly attested as required by law but not registered cannot be said to have the power to revoke the contract. In the case of a gift, we are dealing with a transaction which is *ex hypothesi* without consideration, and the right to revoke an incomplete gift in the donor or to cancel his own act before the transfer is effected is an incident of this type of transaction.

As regards the decided cases, I do not consider it necessary to refer to them in detail now. I have considered all the cases; and my view is that, so far as they lay down that it is not essential for the purposes of valid registration that it should be with the consent of the donor, I am in complete agreement with them. But I am unable to agree, so far as the observations or the decisions go to show, that as it is not essential that the donor should be a consenting party to registration, the gift is complete so far as he is concerned as soon as he has executed a document and delivered it to the donee and it is accepted by the donee and it cannot be revoked even though registration is not effected. That proposition is largely based upon the rule of English law relating to deeds and delivery of deeds. I am very conscious that on this point the weight of judicial opinion is against the view which I take. In spite of my desire to accept that view if possible, I remain unconvinced: and it becomes my duty to state the opinion which I have formed. As I consider it essential that in the case of a transaction without consideration like a gift, the points arising in this case should be determined with reference to the Indian law and as I do not feel any doubt in my mind that a gift is

revocable on account of the very nature of the transaction, until it is completed according to law, I hold that the donor has the right to revoke the incomplete gift or to resile from his act before the document is registered. To deny that right to the donor is really to import into the provisions of the Transfer of Property Act a stage in the completion of the gift which is not contemplated or provided for by the Act itself. Shortly stated, I am still of opinion, if I may say so with respect, that the reasoning of the learned Chief Justice in *Subba Rama v. Venkatsubba* (1) is sound and correct.

As regards the second question, it must depend upon the view which one takes of the first question. It is clear that the document when registered would take effect from the date of its execution. But if it is open to the donor to cancel the transaction before the document is in fact registered, it follows that the fact of registration after revocation cannot affect the revocation.

Marten, J.—The questions referred to this Full Bench are in effect whether a donor of immovable property can at any time before actual registration, revoke a gift purporting to have been effected by a registered instrument signed by him and duly attested and accepted by the donee. It is common ground for the purposes of this reference that such an instrument in writing was in fact executed by the plaintiff and attested by two witnesses, and that it was handed to the defendant who accepted the same. It is also common ground that despite the plaintiff's protests the instrument was subsequently registered under the provisions of the Indian Registration Act, 1908.

It is, however, contended by the plaintiff in reliance on *Subba Rama v. Venkata Subba* (1) that he had power to revoke this gift at any time before actual registration, and that he did in fact so revoke it. On behalf of the defendant it is contended that this decision is opposed, at any rate in principle, to several decisions in other High Courts, and that it cannot be supported if the material sections of the Transfer of Property Act, 1882, and the Indian Registration Act be closely investigated.

Turning then first to the Transfer of Property Act, which was applied to this Presidency in 1898, it is material to observe that in S. 3 "registered" is defined

to mean "registered in British India under the law for the time being in force regulating the registration of documents." Next, S. 4 provides that "S. 54, paragraphs 2 and 3, 59, 117 and 123 shall be read as supplemental to the Indian Registration Act." Next, Chapter II deals with transfers of property by act of parties and it defines a "transfer of property" as meaning "an act by which a living person conveys property, in present or in future, to one or more other living persons, or to himself and one or more other living persons." S. 9 provides that "a transfer of property may be made without writing in every case in which a writing is not expressly required by law."

Then if one turns to Ss. 54, 59 and 123, it will be found that in the case of certain sales or mortgages or gifts of immovable property a registered instrument is required. S. 54 defines "sale" as "a transfer of ownership in exchange for a price paid or promised or part-paid and part-promised." It then enacts that "such transfer, in the case of tangible immovable property of the value of one hundred rupees and upwards, or in the case of reversion or other intangible thing, can be made only by a registered instrument." It also provides that "a contract for the sale of immovable property does not of itself create any interest in or charge on such property."

Turning next to mortgages, they are defined in S. 58. Then S. 59 enacts that "where the principal money secured is one hundred rupees or upwards, a mortgage can be effected only by a registered instrument signed by the mortgagor and attested by at least two witnesses."

Next we come to gifts. S. 122 defines a gift as:—

"The transfer of certain existing moveable or immovable property made voluntarily and without consideration by one person called the donor, to another, called the donee and accepted by or on behalf of the donee. Such acceptance must be made during the lifetime of the donor and while he is still capable of giving. If the donee dies before acceptance, the gift is void."

Stopping there for a moment, as I have already pointed out, there was an acceptance here by the defendant donee, and moreover the document itself was handed to him. So, S. 122 was complied with here.

Next we come to S. 123 which runs as follows:—

"For the purpose of making a gift of immovable property, the transfer must be effected by a registered instrument signed by or on behalf of the donor, and attested by at least two witnesses. For the purposes of making a gift of moveable property, the transfer may be effected either by a registered instrument signed as aforesaid, or by delivery. Such delivery may be made in the same way as goods sold may be delivered."

Section 126 provides for revocation of a gift in certain specified events which have not taken place here, and it ends as follows: "Save as aforesaid a gift cannot be revoked."

The use in S. 123 of the expression "registered instrument" has led to the argument that unless and until the instrument is registered, it is no more an instrument within the meaning of the Act than it would be if it had never been executed at all. But I think the proper way to construe this section is first of all to read the definition of "registered" into the section and then see how it stands. It would then run: "The transfer must be effected by an instrument signed by or on behalf of the donor, and attested by at least two witnesses and registered in British India under the law for the time being in force regulating the registration of documents." Moreover it is important to observe that Ss. 54 and 59 use the same expression "registered instrument." I think, therefore, that that expression should be dealt with in the same way in all these three sections.

Now as regards transfers by sale or by mortgage under Ss. 54 and 59, it is not contended that a vendor or a mortgagor could revoke a conveyance or a mortgage at any time before registration. And there is one very good reason for that, viz., that the Indian Registration Act does not necessitate the consent of the transferor being obtained to the registration. Under part 12 of the Indian Registration Act, the Registrar has power to register a document despite the refusal of the transferor, provided he is satisfied that it has been executed. (See S. 75 (1)). It is only if he refuses to order registration that there is an appeal to the Civil Court under S. 77.

Consequently Ss. 54 and 59 of the Transfer of Property Act are construed as

necessitating two things, viz., (a) a transfer executed by the transferor, and (b) registration which may be effected by either of the parties, but which does not depend on the consent of the transferor.

Why then should we adopt a different construction in S. 123? The Indian Registration Act does not require the consent of the donor to registration any more than it does that of a vendor or a mortgagor. In fact, the document in question in the present case has been registered under part 12 of the Indian Registration Act despite the donor's active opposition. It is, however, said that we ought to adopt a different construction because the transfers referred to in Ss. 54 and 59 are for consideration, but S. 123 refers to a transfer without consideration. I agree that in some cases this distinction may make a practical difference as to whether, quite apart from the validity of the transfer, you can obtain specific performance of any antecedent agreement for such transfer. But I entirely fail to see that it affects the validity of the transfer itself. The Act is here dealing with "transfers" and not with contracts. It indeed expressly excludes contracts of sale in S. 54 from creating any interest in or charge on land.

I wish then to emphasize this distinction between transfers or conveyances on the one hand and contracts on the other hand. They are dealt with in separate Acts, viz., the Transfer of Property Act as to the one, and the Indian Contract Act as to the other; and disregard of the distinction between the two can only result in confusion. Further, since the arguments were concluded, my brothers Fawcett and Mulla have pointed out to me that in India under S. 25 (1) of the Indian Contract Act, a voluntary agreement in writing made on account of natural love and affection between parties standing in a near relation to each other is a binding contract if registered. Consequently one might have a voluntary registered contract to transfer under S. 25 (1), which would be as equally binding as a contract to sell or to mortgage. Whether the transfer to be effected in pursuance of that contract would be validly effected or not would depend on whether the provisions of the Transfer of Property Act were duly complied with. If they were it would be a valid transfer. If they were not, there would in the eyes of the law be no trans-

fer, and the parties would be relegated to their rights under the contract if any. In either event, the validity of the transfer would not depend on the contract nor on the Indian Contract Act. And even as regards contracts, one might get a binding voluntary contract under S. 25 (1) and on the other hand in most cases of mortgage transactions and in some cases of sales, there would be no binding contract at all prior to the document of transfer, though there would normally be some negotiations.

The question then of an antecedent contract or consideration would seem to form no adequate basis for construing the directions as to registration in the sale and mortgage sections in the Transfer of Property Act differently from the corresponding directions in the gift sections of the same Act. In the absence, however, of any argument on S. 25 (1) I give no opinion as to whether specific performance could be obtained of such a contract. So, too, as regards mortgages, there may be difficulties in the way of getting specific performance of an agreement to lend on mortgage: see *South African Territories Ltd. v. Wallington* (12) and *In re Smelting Corporation* (13).

Turning then to the gift sections once more, what are the requisites for a valid voluntary transfer? We have first to see whether we have an instrument duly signed by the donor and attested. Next, if we have, then is it registered? If it is not registered, then under S. 49 of the Indian Registration Act, the document will not affect any immovable property comprised therein, nor can it be received as evidence of the transactions. But if it is registered, then under S. 47 it is to "operate from the time from which it would have commenced to operate, if no registration thereof had been required or made, (that is, the date of the document) and not from the time of its registration."

This, again, is an important point. If the plaintiff is correct, registration is really analogous to execution or attestation; and until all the three requisites are satisfied there is no complete document. If that argument is sound, then the document ought to operate from the date of registration, and not from the date of its execution. In this respect the fact that

S. 4 of the Transfer of Property Act directs S. 123 to be read as supplemental to the Indian Registration Act is material. It assists the view that while the ordinary law as to transfer is stated in Chapter II of the Transfer of Property Act, the provisions as to registration are to be effected in accordance with the provisions of the Indian Registration Act, which are the governing provisions and which in no way necessitate the continuing consent of the transferor.

I am accordingly unable to agree with the judgment of Sir Norman Macleod in *Subba Rama v. Venkatasubba* (1) where he says (p. 430):—"Therefore a gift is a transfer and the transfer of immovable property gifted cannot be effected except by a registered instrument. It must follow that the gift is incomplete until the document is registered." The answer to this contention I have endeavoured to give above, but it is more pithily expressed by Sir Edward Chamier in *Parbati v. Baij Nath Pathak* (3) where he says (p. 305):—"Registration is not the act of the donor but the act of an officer appointed by law to register documents." No doubt in one sense a gift is incomplete until registration, just as transfers on sale or mortgage may in a broad sense be said to be incomplete before registration. But they are not incomplete in the sense that the transferor can annul the transaction. It might equally be argued that an unstamped transfer is incomplete because until it is duly stamped it cannot be put in evidence having regard to S. 35 of the Indian Stamp Act. But it could not be contended that that would enable a vendor or a mortgagor to cancel the instrument before it was stamped, and I do not see why a donor should be in a different position. Stamping like registration does not depend on the donor's will and pleasure, but rests with the assignee and the officers appointed by law for those purposes.

The above decision of Sir Edward Chamier, who subsequently became the Chief Justice of Patna, was afterwards adopted on appeal in preference to the judgment of his dissenting colleague: see *Parbati v. Baij Nath Pathak* (3). The Allahabad appellate Court included the Chief Justice Sir Henry Richards, and in the course of their judgment it was stated as follows (p. 4):—

"The sole question to decide, therefore, is whether or not it is necessary in order

(12) [1893] A.C. 309=57 L.J., Q.B. 470=78 L.T. 426=46 W.R. 545=14 T.L.R. 298.

(13) [1915] 1 Ch. 472=118 L.T. 44=(1915) H.B. R. 126=84 L.J., Ch. 571.

that there should be a valid gift of immovable property not only that the instrument should be duly executed and attested in the manner provided by S. 123 of the Transfer of Property Act, but also that the registration should be either at the instance of or at least with the consent of the donor. The section merely provides that the gift should be effected by an instrument executed by the donor, attested by two witnesses and registered. In our opinion a document registered in accordance with the provisions of the Registration Act is a registered instrument, and if the document is in fact duly registered in accordance with those provisions the gift is complete and valid. The law does not require that the registration should be at the instance of or with the consent of the donor."

Turning, again, to *Subba Rama v. Venkatasubba* (1) there is no reference in the judgments to the corresponding sections of the the Transfer of Property Act dealing with sales and mortgages. We are consequently without the advantage of knowing the exact grounds on which the learned Chief Justice would distinguish the operation of Ss. 54 and 59 from S. 123. But, speaking for myself, I entirely agree with and respectfully adopt the judgment of the present Chief Justice of Madras in *Venkati Rama Reddi v. Pillati Rama Reddi* (4) where, after setting out in detail the more material sections of the Transfer of Property Act and the Indian Registration Act, he proceeds as follows (p. 208):—

"It seems to me that the whole of this machinery for compulsory registration can only apply to cases where in substance the executant of the document or the representative of the executant does not wish to have the document registered. The enquiry will not serve any purpose except on the assumption that the executant desires to withdraw the document from registration. But if the argument to which effect is given in *Ramamirtha Ayyan v. Gopala Ayyan* (8) is right, in all such cases an enquiry would be wholly beside the point, because all that the donor or his representative has to say is that nothing is to be inquired into. 'I do not think the Registrar is to go at length into the question as to whether I did or did not execute this deed. It is sufficient for me to say that I decline to act upon it and I refuse to register it.' If that is right, of course, it involves this: that the whole

of Part XII which is perfectly general in its terms must be confined to transactions other than transactions of gift. There is nothing to indicate any such intention on the part of the legislature, and, for my part, I see no reason at all for the distinction suggested between transfers by gift and transfers by sale. As it is pointed out in some of the text books, the effect of the decision in *Ramamirtha Ayyan v. Gopala Ayyan* (8) is to draw a distinction which is nowhere indicated in the Act between documents registered with the consent of the executant in the first instance and documents registered with the consent of the representatives...now that the matter has been raised directly before us, my own opinion emphatically is that it is contrary to principle and cannot be supported and it would create hopeless difficulties and inconsistencies in the matter of registration."

The point was, however, referred to the Full Bench who agreed with the opinion expressed by Mr. Justice Coutts Trotter, and in the course of their judgment it was said (p. 211):—

"The doctrine that a donor who has left his gift incomplete cannot be compelled to complete it, has no application to a case like this; for so far as he is concerned he has by executing the deed done all that he need do, for registration can be effected even without his co-operation."

Speaking for myself, I think that the policy of the Transfer of Property Act is to substitute written documents and registration for oral evidence as regards certain descriptions of transfers. But if a written document duly registered like the one in the present case is to be liable to be upset on some alleged revocation before registration, one main object of the Act is frustrated. The argument advanced by the plaintiffs does not confine the alleged right of revocation to revocation by a written and registered instrument. If then it may be oral, there is at once an opening for a false oral story which will be easy to concoct and difficult to check—an opening which I have no doubt would be seized on with avidity by many a litigant. And as to how many years must elapse before it would be safe to accept any title depending on a voluntary transfer, supposing the Transfer of Property Act be construed in that way, I would leave to those skilled in the Indian Limitation Act to consider.

It was argued by the learned pleader for the plaintiff that the decisions of *Parbati v. Baij Nath Pathak* (3) and *Venkati Rama Reddi v. Pillati Rama Reddi* (4) can be distinguished on the ground that in those cases there was merely an absence of consent by the donor to the registration whereas in the present case there was an act of positive withdrawal or revocation. But I am unable to see that in principle there is any essential difference in this particular class of case. The mere use of the word "revoke," as used in the formal questions submitted to us, implies that a gift has already been affected, and not that there is an absence of one of those conditions of consent which are necessary for the efficacy of a transaction before it can be said to be completed. Consequently we are asked to treat the instrument much as if it contained an implied power of revocation in the donor prior to actual registration. If the donor wished to retain any such power, or for the matter of that a more extensive power of revocation, it could easily have been inserted in the instrument. But in fact the instrument contains nothing of the sort, nor in my opinion is there anything in the Act which on its fair construction reserves any such power of revocation in the donor, any more than it does in cases of sales or mortgages. On the contrary, S. 126, as I read it, would appear expressly to negative any such right on the part of the donor. It provides that "save as aforesaid a gift cannot be revoked."

Some reference was made to the fact that the parties are Hindus, and that under Hindu law, as laid down in these Courts prior to the application of the Transfer of Property Act to this Presidency, possession would have been essential for a gift whether or no a writing was required. But the learned pleader for the plaintiff evidently found it difficult to contend that prior to the Transfer of Property Act, a Hindu donor could revoke his gift before registration, provided possession had been given. Consequently there seems all the less reason for contending that he should now be given such a power merely because an instrument in writing duly attested is substituted for the possession formerly required under the Bombay decisions for the validity of a gift, and that registration is also required just as it was before if the gift was in writing. I say the Bombay decisions

because subsequent rulings of the Privy Council have thrown some doubt upon the point. But I need not pursue the matter further, nor consider the question of possession in the present case which I understand is a disputed point of fact, because as I read S. 129 of the Transfer of Property Act, the validity of a gift is now determined by the Transfer of Property Act under which possession is not essential for the validity of the gift in the present case.

Reference was also made during the course of the able arguments to the English law of gifts. One of the clearest statements I know of on that subject is the well known judgment of Sir George Jessel in *Richards v. Delbridge* (14). He there points out the difference between a valid gift and a declaration of trust, and states that an incomplete gift will not necessarily be treated as a valid declaration of trust. His exact words are (p. 14):

"The principle is a very simple one. A man may transfer his property, without valuable consideration, in one of the two ways; he may either do such acts as amount in law to a conveyance or assignment of the property, and thus completely divest himself of the legal ownership, in which case the person who by those acts acquires the property takes it beneficially, or on trust, as the case may be; or the legal owner of the property may, by one or other of the modes recognised as amounting to a valid declaration of trust, constitute himself a trustee, and, without an actual transfer of the legal title, may so deal with the property as to deprive himself of its beneficial ownership, and declare that he will hold it from that time forward on trust for the other person...The true distinction appears to me to be plain, and beyond dispute; for a man to make himself a trustee there must be an expression of intention to become a trustee, whereas words of present gift shew an intention to give over property to another, and not retain it in the donor's own hands for any purpose, fiduciary or otherwise."

In India, as has been pointed out to me by my brother Fawcett after the conclusion of the arguments, S. 5 of the Indian Trusts Act 1882 requires a trust of immovable property to be in writing and registered. We have heard no argu-

(14) [1874] 11 Eq. 11=22 W. R. 584—49 L. J. Ch. 409.

ment on this section, and therefore I give no definite opinion on it. But to me it would seem difficult to argue that the declarant has a *locus penitentie* or an implied power of revocation at any time after execution and before actual registration. Here, again, registration could be effected even if he actively dissented.

Kekewich v. Manning (15) is another leading case on the subject of gifts or voluntary settlements. There Lord Justice Knight Bruce had to determine whether an alleged gift or settlement was complete or merely inchoate, and he stated the question in the following terms (p. 187):—

"The present case has raised, necessarily or unnecessarily, a question which on several occasions, under different aspects, and in various circumstances, has been brought before this Court, especially since the time of Lord Hardwicke the question, namely, whether an act or intended act of bounty, whether a gift or a promised or intended gift, was in truth a perfect act, a completed gift, resting neither in promise merely, nor merely in unfulfilled intention; or was incomplete, was imperfect, and rested merely in promise or unfulfilled intention."

Milroy v. Lord (9), which is cited in the referring judgment of Mr. Justice Fawcett, is another leading case on the subject of English gifts.

It has been argued before us that on the principles laid down in those decisions the donor here has not done all that he could do to perfect the gift, because he himself might have got it registered. But I think that would be stretching the principles of the English law of gift much too far. If sound, the same argument might also equally apply to a document which was not stamped by the vendor. The answer to it is that it is sufficient if the vendor has done all that he need do to enable the donee to get the fruits of the intended gift. The cases of *In re Patrick* (16) and *In re King* (17) would tend to show that it will suffice for a valid gift if the settlor has done what is necessary on his part for a voluntary assignment, and has thus enabled his assignees to take any further steps that may be necessary to obtain the subject matter of the gift. *Mallott v.*

Wilson (18) decides that the mere disclaimer by a voluntary assignee, *e. g.*, the trustee will not render a voluntary settlement inoperative, nor give the settlor any power to revoke the gift unless an express power of revocation has been reserved in the instrument.

Further, no case has been cited to us to the effect that under the English law of gift a donor can withdraw gift at any time before registration, supposing the land is in a county where registration is compulsory. So far as my own recollection goes, there is no such authority, nor have I any recollection of its being customary on sales to frame requisitions asking whether a donor had revoked his gift before registration, as might have been the case if the plaintiff's present contentions are sound in law. There are, however, material differences between the English and the Indian laws of registration, as is pointed out by their lordships of the Privy Council in *Tilakdhari Lal v. Khedan Lal* (19). That decision does not, however, refer to S. 20 of the English Land Transfer Act, 1897, which provides that on sales of land in compulsory districts a purchaser does not get the legal estate unless and until the document is registered under that Act. Registration under that Act is quite distinct from registration under the Middlesex or Yorkshire Registry Acts. But I have not thought it necessary to refresh my memory by making any extensive search of the English authorities on the subject, as after all the case which we have to deal with is a case of Indian land and is governed by an Indian statute. The real question we have to decide is what is the true effect of that statute or rather of the two statutes, the Transfer of Property Act and Indian Registration Act.

Summarizing then the rival arguments, I find that the plaintiff has to concede that neither a vendor nor a mortgagor can revoke a transfer at any time before registration and that even voluntary transfers do not require the active consent of the donor to the registration. Further, a voluntary transfer may in some cases be in pursuance of a binding contract under S. 25 (1) of the Indian Contract

(18) [1903] 2 Ch. 494—72 L. J. Ch. 664—89 L. T. 522.

(19) [1920] 47 I.A. 289=29 M. L. J. 243=(1920) M.W.N. 591=25 C.W.N. 49=22 Bom. L.R. 1319=28 M. L. T. 224=18 A. L. J. 1074=57 I.C. 465=32 C. L. J. 479.

(15) [1851] 1 D. C. G. M. & G. 176—21 L. J. Ch. 577—16 Jur. 625.

(16) [1891] 1 Ch. 82.

(17) [1879] 14 Ch. D. 179.

Act, just as a transfer on sale or mortgage may be in pursuance of an antecedent contract. But we are asked by the plaintiff to draw a distinction in the case of certain gifts between passive and active dissent to registration, and to say that while the former is immaterial, the latter invalidates the transaction. Speaking for myself I think that this distinction is nowhere to be found in the Acts, and should not be drawn; and that on the contrary the Acts were intended to shut out the very class of evidence on which this distinction if once allowed would normally be based—I mean oral evidence.

After giving then my best consideration to the several contentions put before us in the referring judgments and at the bar, I have arrived at the conclusion that the decision of the Division Bench in *Subba Rama v. Venkatsubba* (1) cannot be supported; that the correct principles are those enunciated in *Venkati Rama Reddi v. Pillati Rama Reddi* (4) and *Parbati v. Baij Nath Pathak* (3); and that accordingly the first question submitted to us should be answered in the negative. Consequently the second question does not arise.

Fawcett, J. I retain my former opinion and agree with the judgment of my brother Marten.

I think there is a fallacy in the view that a gift is not "completed" till the required instrument has been registered. S. 123 does not use the word "completed" but the word "effected." The distinction to my mind is that a gift may be "complete" so far as the donor is concerned, when he has executed and handed over to the donee, who accepts it, the requisite instrument; but the gift is not legally "effective" as a valid transfer of the immovable property until the instrument has been registered.

As a similar case, I may refer to the law regarding a non-testamentary and voluntary settlement of immovable property. Under S. 5 of the Indian Trusts Act 1882, this can only be done by an "instrument in writing signed by the author of the trust or the trustee and registered." S. 78 provides that when the trusts of the settlement have been "declared by a non-testamentary instrument," they can only be revoked in exercise of a power of revocation expressly reserved to the author of the trust. If the author of the trust gave the instrument to the beneficiary and the latter got

it registered, the language of S. 78 seems to me to be against the supposition that the author of the trust could revoke it before it is actually registered. If that had been intended, one would expect the word "registered" before "non-testamentary instrument": cl. (b) of S. 78.

I agree with my learned brother Marten that the fact of a gift being without consideration makes no difference. This point was discussed in *Behari Lal Ghose v. Sindhubala Dasi* (10) and the learned Judges say (p. 439):—"The substance of the matter is that although in contracts for sale, mortgage, lease or exchange, there is pecuniary consideration, and in a gift there is no such consideration, the right of rescission is circumscribed by the same set of circumstances."

It is to be noted that S. 59 of the Transfer of Property Act uses the same word "effected," as is used in S. 123, yet it is not contended that the mortgagor has a "*locus penitentie*" to resile from the transaction before the instrument of mortgage is registered. It is, however, said that the case of a gift is different, because S. 25 of the Indian Contract Act allows the intending donor, in the case of an agreement to make a gift, to withdraw it at his will unless the agreement has been registered, as stated in S. 25 of the Indian Contract Act. But this seems to me to beg the question at issue before us. Thus take illustration (b) to S. 25, viz.:—

"A, for natural love and affection, promises to give his son, B, Rs. 1,000. A puts his promise to B into writing and registers it. This is a contract." To my mind, the words of clause (1) of S. 25 equally apply to a case like that before us, and the illustration might be altered by substituting for the words "and registers it" the words "and hands the document to B, who gets it registered under the provisions of the law in force for the registration of documents." It begs the whole question to assume that, unless A himself registers the document or assents to its registration, there is no valid contract.

The difference of opinion between the members of this Bench seems to turn ultimately on the question whether the requirement of registration is *per se* essential, irrespective of the consideration that the donor, by handing the document to the donee, has put it out of his power to prevent registration. I

can see nothing in the rule as to *locus pœnitentiae* laid down in *Maddison v. Alderson* (20) which extends the *locus* to such a case. On the contrary Lord Selborne's quotation from Bell's principles at p. 476, viz., "from an obligation to which writing is requisite and has not yet been admitted in an authentic shape," refers *prima facie* merely to the requirements of execution of a proper instrument and not to any subsequent production of the document or other act of that kind, independent of the will of the executant.

I would also draw attention to the fact that the rule of Hindu law that a gift is not valid unless it is accompanied by delivery of possession of the subject of the gift from the donor to the donee was not construed to allow the donor a *locus pœnitentiae* up to actual delivery, provided the donor had done all that he could to complete the gift. *Kalidas Mullick v. Kanhaya Lal Pundit* (21) and *Joitaram v. Ramkrishna* (7). This is, in my opinion, weighty authority in favour of applying the same principle to the requirement of registration, in any case where the donor has done all he need to complete the gift and by handing the instrument to the donee has put it out of his power to prevent its registration.

I would, therefore, answer the reference as proposed by my brother Marten.

Mulla, J.—The facts which have given rise to the present reference are shortly as follows:—

On September 17, 1917, plaintiff No. 1 executed an instrument of gift in favour of the defendant of certain moveable and immovable properties belonging to him, and handed it to the defendant. On September 26, 1917, the defendant presented it for registration. Plaintiff No. 1 did not appear before the Sub-Registrar, and the Sub-Registrar refused to register the deed. The defendant appealed to the Registrar. During the course of the proceedings before the Registrar the plaintiff appeared before the Registrar and declared his intention not to abide by the writing and denied execution. The Registrar ordered it to be registered, and it was accordingly registered on December 18, 1917. Subsequently, plaintiff No. 1 adopt-

ed plaintiff No. 2 and they both filed the present suit on August 7, 1920, to set aside the alleged gift and for possession of the properties.

The questions referred to the Full Bench are:—

(1) Was it competent to the donor to revoke the gift of immovable property before the instrument was in fact registered?

(2) If so, whether the subsequent registration of the document against the wishes of the donor makes the revocation ineffective?

The provisions of the Indian law bearing on gifts are contained in Chapter VII of the Transfer of Property Act, IV of 1882. "Gift" is defined in S. 122 as a "transfer of... property made voluntarily and without consideration by one person, called the donor to another, called the donee."

S. 123 of the Act is as follows:—"For the purpose of making a gift of immovable property, the transfer must be effected by a registered instrument signed by or on behalf of the donor, and attested by at least two witnesses."

By S. 126 it is provided that "the donor and donee may agree that on the happening of any specified event which does not depend on the will of the donor a gift shall be suspended or revoked... A gift may also be revoked in any of the cases (save want or failure of consideration) in which, if it were a contract, it might be rescinded. Save as aforesaid, a gift cannot be revoked."

"Transfer of Property" is defined in S. 5 as meaning an act by which a living person conveys property to another living person. By S. 9 it is provided that "a transfer of property may be made without writing in every case in which a writing is not expressly required by law." The expression "registered" is defined in S. 3 as meaning "registered in British India under the law for the time being in force regulating the registration of documents." The law in force regulating registration at the date of the writing in this case was the Indian Registration Act XVI of 1908.

The point involved in the first of the two questions referred to the Full Bench is whether an intending donor who has executed an instrument of gift, attested as required by S. 123 of the Transfer of Property Act, and handed it to the intending donee, has a *locus pœnitentiae* or implied power of revocation prior to registration

(20) [1883] 8 A. C. 437=52 L. J. Q. B. 737—49 L. T. 301=31 W. R. 20=47 J. P. 821.

(21) [1884] 11 Cal. 121=11 I. A. 218=4 Sar.

of the instrument, or whether after he has executed and handed the instrument as aforesaid, the plea of *locus penitentiae* is barred.

The limits of the rule as to *locus penitentiae* were thus stated by Lord Selborne in *Maddison v. Alderson* (20) (pp. 476, 477):—

"It is not in England only that such a doctrine prevails; a similar (perhaps even a larger) equity is also recognised in other countries, whose equitable jurisprudence is derived from the same original sources as our own. By the law of Scotland, 'written contracts in strict technical language are those of which authentic written evidence is required, not merely in proof, but in solemnity; as obligations relative to land; or obligations agreed to be reduced to writing; or those required by statute to be in writing.' To constitute any such contract there must be a 'final engagement'; and as a corollary to that rule a '*locus penitentiae*' is given; i. e., 'a power of resiling from an incomplete engagement, from an unaccepted offer, from a mutual contract to which all have not assented, from an obligation to which writing is requisite and has not yet been exhibited in an authentic shape.' But to this '*rei interventus*' raises a personal exception, which excludes the plea of *locus penitentiae*. It is inferred from any proceedings, not unimportant, on the part of the obligee, known to and permitted by the obligor to take place on the faith of the contract, as if it were perfect; provided they are unequivocally referable to the contract, and productive of alteration of circumstances, loss, or inconvenience, though not irretrievable.' Bell's Principles, Ss. 18, 25, 26."

Portions of the passage cited above were cited with complete approval by their lordships of the Privy Council in *Mahomed Musa v. Aghore Kumar Ganuli* (22) and also in *Malraju Lakshmi Venkayamma v. Venkata Narasimha Appa Rao* (23). In the former case their lordships observed that there was nothing in the law of India

inconsistent with the law as stated by Lord Selborne, but upon the contrary, that the law followed the same rule.

Reading Ss. 122 and 123 together, a "gift" is a transfer which must be "effected" by registered instrument signed by the donor and attested by at least two witnesses. It follows from these two sections that a gift cannot be said to be "effected" unless the transfer which constitutes the gift is itself "effected" in the manner prescribed by S. 123. In the present case there is an instrument signed by the donor and attested by two witnesses; but before the instrument was registered, the donor declared his intention not to be bound by it, and he actually denied execution before the Registrar. The position then is this, that at the date on which the donor repudiated the transaction, there was no transfer "effected" in the manner prescribed by law and there was no valid and complete gift, in other words, there was no gift at all: see the observations of their lordships of the Privy Council in *Sadik Husain Khan v. Hashim Ali Khan* (24) where their lordships said that "transfer" with the meaning of S. 122 meant *prima facie* a valid transfer. It is true that in the present case the donor did "all that he need do" towards completing the gift, namely that he executed the writing and handed it to the donee, but it cannot be said, having regard to the language of S. 123, that because he did so, there was a transfer "effected" by way of gift, for a transfer by way of gift under that section can only be "effected" by a registered instrument. It is also true that having regard to the provisions of the Indian Registration Act, the registration could be effected without the co-operation of the donor and even against his consent, and further, that on the instrument being registered, it operates from the date of its execution as distinguished from the date of registration, but it cannot be inferred from this that a transfer by way of gift had been "effected" in the manner prescribed by S. 123 before the date on which the donor drew back from the transaction. It is also true that when the donor executed and handed over the document to the

(22) [1915] 42 Cal. 80 = 12 I.A. 1 = 17 Bom. L.R. 420 = 21 O.L.J. 291 = 2 L.W. 258 = 28 M.L.J. 548 = 19 C.W.N. 250 = 28 I.C. 930 = 13 A.L.J. 229 = 17 M.L.T. 143 = (1915) M.W.N. 621 (P.O.)

(23) [1916] 39 Mad. 509 = 43 I.A. 138 = 20 C.W.N. 1054 = 14 A.L.J. 797 = 31 M.L.J. 58 = (1916) 2 M.W.N. 23 = 20 M.L.T. 137 = 4 L.W. 58 = 34 I.C. 921 = 18 Bom. L.R. 651 = 24 O.L.J. 279 (P.O.)

(24) (1916) 38 All. 627 = 43 I.A. 212 = 31 M.L.J. 607 = 14 A.L.J. 1248 = 19 O.C. 192 = 18 Bom. L.R. 1037 = 21 C.W.N. 130 = (1916) 2 M.W.N. 57 = 21 M.L.T. 40 = 1 Pat. L.W. 157 = 4 O.L.J. 22 = 25 O.L.J. 363 = 36 I.C. 104 = 6 L.W. 378 = 10 Bur. L.T. 140 P.O.

donee, there was a clear intention expressed on his part to give, and a clear intention on the part of the donee to take, but that does not conclude the case. The intention must be expressed in the manner prescribed by law, that is, by a registered instrument signed by the donor and attested by at least two witnesses. Thus prior to the enactment of the Transfer of Property Act, delivery of possession was necessary in the case of Hindus, to complete a gift, where possession could be delivered. If a donor prior to that Act executed an instrument of gift attested by witnesses and even if he got it registered, there was no gift if the transfer was not accompanied by delivery of possession, though the intention to give and to take was unequivocally expressed by the instrument; the reason being that the condition prescribed by the law, namely, delivery of possession, had remained unfulfilled. And the same was held of a Mahomedan gift in *Sadik Husain Khan's* case (24) referred to above. It seems to me that the registration prescribed by S. 123 is not mere evidence of the gift, but is part of the gift itself. It is, I think, a necessary part of the proposition that a gift has been "effected." It is not mere evidence to prove that there has been a gift, but it is a fact to be proved to constitute the proposition that there has been a gift. For the above reasons, I have come to the conclusion that at the date on which plaintiff No. 1 resiled from the transaction, no transfer by way of gift had been "effected" as required by S. 123 of the Transfer of Property Act, in other words, there was no gift in law. Whether a transfer by way of gift is effected or not is a question to be determined exclusively with reference to the provisions of S. 123. You cannot split the requisites prescribed by the section into two parts, namely, (1) a writing signed and attested, and (2) registration, and say that because according to the English law a gift is effected when the donor executes a deed of gift, there is a gift "effected" in the present case also, the donor having signed a document attested by two witnesses, and having handed it to the donee. According to the English law, in the case of a voluntary deed, the donee is entitled to possession of the immovable property immediately on the execution of the deed. It cannot be suggested that in cases governed by the Transfer of Property Act, a donee is enti-

tled to possession immediately on execution of the instrument of gift and before it is registered. The present case seems to me to be pre-eminently a case in which the analogies of English law ought not to be applied in construing an Indian enactment nor can you say, that in cases governed by the Transfer of Property Act, a transfer by way of gift may be deemed to be "effected" for the purpose of excluding the plea of *locus pœnitentiæ*, and not yet "effected" for the purpose of making it a valid gift. It seems to me that the distinction sought to be drawn in this case between a "complete" transfer and a "valid or effective" transfer is far-fetched, and it cannot be supported either in principle or on authority. I readily accept the proposition that a donee under an instrument of gift can have the document registered without the consent and even against the wishes of the donor, but that does not, in my view, justify the proposition that registration is not an essential part of a transfer by way of gift. The gift in the present case, when it was withdrawn, was inchoate, and plaintiff No. 1 had therefore a *locus pœnitentiæ*. I do not think that the *locus pœnitentiæ* was barred by anything done by him subsequent to the execution of the writing. There is no such *rei interventus* in the present case as could raise a personal exception, which excludes the plea of *locus pœnitentiæ*.

Such being my view of the case, S. 126 does not apply. It applies only to a "gift" that is, a gift made in the manner prescribed by S. 123. In the present case, there was no "gift" on the date on which plaintiff No. 1 resiled from the transaction.

It was contended on behalf of the defendant that S. 54 of the Transfer of Property Act which relates to sales and S. 59 of the same Act which relates to mortgages are in terms similar to S. 123, and that if a vendor or a mortgagor cannot after execution of the instrument of sale or mortgage resile from the transaction before the instrument of sale or mortgage is registered, a donor also cannot resile after execution of the instrument of gift and before registration thereof. I feel myself unable to accede to that contention. The reason why a conveyance or a mortgage cannot be revoked after execution and before registration is not because registration may be effected in spite of the

donor's protest but because in the case of sales and mortgages once a contract of sale or mortgage is made, neither a vendor nor a mortgagor could rescind it at his pleasure, while in the case of an agreement to make a gift, the intending donor may withdraw it at his will except in the rare cases where an agreement to make a gift is made in favour of a near relation out of love or affection and it has been registered, as provided in S. 25 of the Indian Contract Act, 1872. Even in that case the agreement, according to the view I take of the law may be terminated by the donor at his pleasure at any time before it is registered.

There are two other sections of the Transfer of Property Act to which I may here refer. One of them is S. 9 which provides that "a transfer of property may be made without writing in every case in which a writing is not expressly required by law." The other is S. 107 by which it is provided that all leases of immovable property other than those mentioned in the first paragraph of the section may be made "either by registered instrument or by oral agreement accompanied by delivery of possession." It was argued on behalf of the defendant that as no mention was made of registration in S. 9, registration did not form part of a "transfer," and the transfer in the present case was therefore "effected" when plaintiff No. 1 executed and handed the instrument of gift to the defendant. Now it is to be observed that just as there is no mention made of registration in S. 9, so there is no mention made of delivery of possession in that section. If the argument addressed by the pleader for the defendant were sound, it would follow that a lease of the kind mentioned above could be made merely by an oral agreement, and delivery of possession should be treated as registration is sought to be treated, as mere evidence of the lease as distinguished from part of the lease itself. Such a proposition is, on the face of it, untenable. The fact of the matter is that S. 9 does not deal with the essentials of a transfer. It indicates only two modes of transfer, namely, a transfer in writing and an oral transfer. Transfer by delivery which is one of the alternative modes of transfer in the case of a gift of moveable property is not mentioned in the section, and yet transfer by delivery is undoubtedly

ly one of the modes of transfer. S. 9 does not purport to deal with the various modes of transfer. The modes of transfer are prescribed in Ss. 54, 59, 107 and 123. S. 9 says no more than this that where a writing is not expressly required by law, a transfer may be made without writing. It simply recognises oral transfers. The marginal note to the section, namely, "Oral transfer," indicates the scope and intent of the section. Upon long consideration, I have reached the conclusion that the first question must be answered in the affirmative and the second question in the negative. Before concluding this judgment I feel I ought to say that the case was argued with remarkable ability by the learned pleaders on both sides. Indeed, it could not have been argued better.

Kincaid, J.—I agree with the judgment given by my learned brother Marten, and would answer the reference in the manner indicated by him.

Shah, Ag. C. J.—In accordance with the opinion of the majority, the answer to the first question will be in the negative. There will be no answer to the second question as being unnecessary.

Answer accordingly.

1925 BOMBAY 227

SHAH, AG. C. J. AND KINCAID, J.

Bhagwandas Rangildas—Appellant.

v.

Secretary of State—Respondent.

F. A. No. 98 of 1922, Decided on 26th August, 1924, from the decision of Asst. J., Khandesh in Suit No. 4 of 1920.

Forest Act (8 of 1878) S. 84—Section does not apply to all consequences of rescission of contract.

S. 84 does not apply generally to the consequences of a breach on the part of the contractor but only to a particular penalty provided for a breach of the condition as to the contractor performing any duty or act or abstaining from a particular act.

Pendse and V. D. Limaye—for Appellant.

S. Patkar—for Respondent.

Shah Ag. C. J.—The few facts, which are really not in dispute, relating to this appeal are these. On August 26, 1918, the present plaintiff entered into a contract with the Secretary of State for India in Council for the felling and removal and purchase of timber, fire wood and other things specified in item (a) of the Schedule annexed to the contract from the portion of the reserved forest in the Taloda range of the North Khandesh Division, which is known as Coupe No. 14 of 1918-19 of Block II.

The conditions of this agreement are set forth in detail in Exhibit 14. Under condition I (a) the plaintiff was to pay the sum of Rs. 5,325 in the following four instalments:—

- Rs. 1,332 on August 30, 1918.
- „ 1,331 on December 1, 1918.
- „ 1,331 on January 1, 1919.
- „ 1,331 on February 1, 1919.

He was at liberty under this contract to cut certain trees and remove them, subject to the conditions as to passes being given by the Forest Department, except certain trees, which are described as "reserved trees" in the Schedule to the contract. He deposited Rs. 540 as security for the due performance of the contract. In the beginning of this contract it is provided as follows:—

"The contractor, and each of his servants and agents will abstain from every act expressed in the conditions contained as to the abstaining from, and the contractor does hereby agree, in case any breach of such conditions, to pay the Secretary of State through the Divisional Forest Officer on demand made in such behalf by him the sum of Rs. 100, or such smaller sum as may in each case be determined by the Divisional Forest Officer, in default whereof the whole of the said sum of Rs. 100 will in accordance with S. 84 of the said Act (Forests Act VII of 1878, as amended by Act I of 1918) be recoverable from him as an arrear of land revenue."

Under condition II (d) he was required to abstain from felling certain trees.

In condition III, clause (j), it is provided as follows:—

"The contractor, further in addition to the conditions hereinbefore contained on each breach of any of which the sum of one hundred rupees aforesaid is to be paid, agrees to the following conditions; that is to say: (j) The Divisional Forest Officer,

in case of any breach of any condition hereinbefore contained may, in lieu of or in addition to requiring the payment of or recovering any sum payable in case of such breach, by a notice in writing upon the contractor, or, where there is more than one contractor, upon any of them, on behalf of them all, suspend the operation of the agreement pending the decision of the Conservator of Forests."

Under clause (k) of that condition the Conservator of Forests had power to put an end to the agreement in case of failure to fulfil any of the conditions of the contract,

In clause (l) of the same condition it is provided, among other things, that:—

"The money which may have been paid to Government under the agreement, and the entire stock of timber, firewood and other things in the coupe or at the depot aforesaid at the time at which the operation of the agreement was suspended by the Divisional Forest Officer, shall be and remain the property of Government, and shall be disposed of for the benefit of Government, in such manner as the Conservator of Forests directs."

It appears that this contract was signed on October 29, 1918, but the contract has been treated as a contract of August 26, 1918. The plaintiff took possession of the particular coupe on November 30, 1918, and within the first few days of his operations, it appeared that he was cutting some of the reserved trees. Therefore on December 10, the Ranger ordered the plaintiff orally to stop the cutting operations: and on December 16, 1918, the Divisional Forest Officer by his order (Exhibit 43) suspended the operation of the contract until the final decision of the matter by the Conservator of Forests. He took this action under clause (j) of condition III of the contract. Ultimately on April 28, 1919, the plaintiff received a notice from the Conservator of Forests under which the contract was rescinded, and certain consequences were stated as having resulted from the breach of the condition as to his abstaining from cutting reserved trees under the contract. In substance under that notice the Conservator of Forests claimed the deposit money, and the timber, firewood and other things in the coupe at the time at which the operation of the agreement was suspended by the Divisional Forest Officer and also the sum of Rs. 100 claimable in

respect of the breach of the condition as to not cutting reserved trees. A further notice was given on May 7, 1919; and again on May 21, 1919, the contractor was called upon to pay the remaining three instalments. These sums amounting to Rs. 3,993 were recovered as land revenue from the plaintiff in May 1919; but subsequently in January 1920 Rs. 2,662 were refunded to him.

The plaintiff filed the present suit on April 7, 1920, in which he claimed, on the footing of a breach of contract by Government, Rs. 3,000 as damages, and Rs. 3,656 as per particulars shown in para 5 of the plaint.

The defence was that there was a breach on the part of the plaintiff, that the contract was rightly rescinded, that under clause (1) of condition III of the contract, the Government were entitled to retain the two instalments, one of which was paid in fact and the other became payable before the date of the suspension of the operation of the contract, and that the plaintiff was not entitled to any damages.

The first question in the suit was whether the plaintiff had broken the contract and whether the rescission of the contract by the Forest Department was justified. On that point the learned Judge, after a consideration of the evidence, came to the conclusion that the plaintiff cut twenty-five trees, which were really reserved trees, and so far he committed a breach of the condition relating to the non-cutting of reserved trees. According to this finding, rescission of the contract by the Forest Department was justified. Further, the learned Judge came to the conclusion that as the rescission was justified, the defendant was entitled to retain the money in respect of two instalments, one having been paid in September 1918, and the other having become payable in December 1918. The learned Judge allowed Rs. 101-2-6, as representing interest on the sum of Rs. 2,662, which was recovered as land revenue, but which was refunded subsequently by the Forest Department to the contractor. Accordingly in the main the plaintiff's claim was disallowed, but a decree was passed in his favour for Rs. 101-2-6.

The plaintiff has appealed from this decree. First, it is urged in support of the appeal that the lower Court has erred in holding that the plaintiff committed a

breach of the condition as to his abstaining from cutting reserved trees and that the defendant was entitled to rescind the contract. The lower Court has based its conclusion upon two grounds, first, that the plaintiff or his servants and agents cut twenty-five reserved trees in violation of the conditions of the contract, and, secondly, that the plaintiff committed a further breach of the conditions by his failure to pay the second instalment in time.

As regards the second ground it does not appear to have been relied upon by the Divisional Forest Officer in his order, Ex. 43, nor by the Conservator of Forests in Ex. 57; and it appears to us that, having regard to the delay that had occurred in the commencement of the cutting operations, for one reason or other, the delay in the payment of the second instalment by the plaintiff on the due date does not appear to be a sufficient ground for the rescission of the contract. In fact it is not the ground on which the contract was rescinded, so that it may be left out of account.

The other ground for the conclusion is that the plaintiff cut twenty-five trees in violation of the condition as to his abstaining from cutting reserved trees under the contract. On that point the learned trial Judge has considered the oral evidence, and has relied principally upon the evidence of the Sub-Divisional Forest Officer, Ex. 39, and the Range Forest Officer, Ex. 59. We have heard the criticism of this evidence, but we are unable to accept the view suggested on behalf of the appellant that it should not be relied upon. It is not necessary to examine this part of the case in detail. The learned Judge has dealt with it fully, and we are in agreement with his conclusion that it is proved in the case that the plaintiff did cut twenty-five reserved trees, contrary to the terms of the contract, and the breach of that condition entitled the Conservator of Forests to rescind the contract.

The question then arises as to what is the measure of damages or compensation to which the defendant is entitled. As the defendant was entitled to rescind the contract, it is clear that the plaintiff is not entitled to any damages on the footing of a breach by the defendant as claimed by him. In fact the defendant has recovered from the plaintiff the first and the second instalments, i. e., Rs. 2,663, and Rs. 100 as penalty for the breach of

the condition under the terms of the contract, and Rs. 540 deposited by the plaintiff have been forfeited, and the stock lying on the land has been also forfeited. It is urged on behalf of the defendant that he is entitled to claim all this under clause (1) of condition III of the contract.

On the other hand, on behalf of the plaintiff it is urged that the defendant would be entitled only to reasonable compensation, not exceeding the amount named in the contract, under S. 74 of the Indian Contract Act or to compensation for any damage which he has sustained through the non-fulfilment of the contract under S. 75.

As against this it is urged that under S. 84 of the Indian Forests Act, in spite of the provisions of S. 74 of the Indian Contract Act, the defendant is entitled to the full benefit of the provisions of clause (1) of paragraph III of the contract agreed to by the plaintiff under the contract.

The first question, therefore, to be considered is how far S. 84 is applicable to the case in determining the amount of compensation to be awarded to the defendant for the breach on the part of the plaintiff. S. 84 of the Indian Forests Act VII of 1878, as amended by Act I of 1918, is in these terms :—

“When any person, in accordance with any provision of this Act or in compliance with any rule made thereunder, binds himself by any bond or instrument to perform any duty or act or covenants by any bond or instrument that he, or that he and his servants and agents, will abstain from any act, the whole sum mentioned in such bond or instrument as the amount to be paid in case of a breach of the conditions thereof may, notwithstanding anything in S. 74 of the Indian Contract Act, 1872, be recovered from him in case of such breach, as if it were an arrear of land-revenue.”

The contract provides that the plaintiff and his servants and agents will abstain from cutting the reserved trees, and the penalty provided for a breach of this condition is Rs. 100. It is quite clear that to that provision in the contract S. 84 of the Indian Forests Act would apply.

But it is further contended on behalf of the respondent that S. 84 of the Indian Forests Act really applies to the whole contract, and when the contract was

rescinded on account of a breach of this condition, the penalty provided in clause (1) of paragraph III of the contract became recoverable under S. 84, in spite of the provisions of S. 74 of the Indian Contract Act.

Having regard to the terms of the contract, as also to the terms of S. 84 of the Indian Forests Act, we are unable to accept the contention that S. 84 applies to clause (1) in the contract, or applies generally to the determination of compensation to be awarded to a party rightly rescinding the contract as damages for non-fulfilment of the contract. The terms of S. 84 of the Indian Forests Act are very specific, and there is clear provision for the application of this section in the terms of the contract itself. S. 84 applies to a particular penalty provided in the contract for a breach of the condition as to the contractor abstaining from any act; and it cannot be applied generally to all the consequences of a rescission of the contract under the terms of the contract. We do not think that clause (1) can be read as mentioning the amount to be paid in case of a breach of a condition which requires the plaintiff and his servants and agents to abstain from any act.

We have, therefore, to determine under S. 74 and S. 75 of the Indian Contract Act, as to what is the proper measure of compensation under the circumstances. It is conceded before us, and quite properly, by the learned Government Pleader on behalf of the respondent that the exception to S. 74 does not apply to this case.

As to the compensation to be awarded under the circumstances of the case, it seems to us that the defendant is fairly entitled to the benefit of the deposit money Rs. 540, as also to the sum of Rs. 100 recovered as penalty under S. 84 of the Indian Forests Act for breach of the condition as provided under the contract. The defendant is also entitled under the circumstances to retain the benefit of all the stock that was there at the date when the operation of the contract was suspended.

The question as to whether the defendant is entitled to any further compensation is not easy, and the evidence in the case does not afford any indication as to what it should be. Having regard to all the circumstances of the case, we think that it would be fair to allow the defendant to retain the amount of the first instal-

ment paid in September 1918. We think, however, that the amount recovered in respect of the second instalment should be paid back to the plaintiff.

Even apart from our determining the amount of compensation under Ss. 74 and 75 of the Indian Contract Act, if we were to interpret clause (1) of paragraph III of the contract we are not sure that the amount recovered as land revenue in May 1919 is amount paid within the meaning of that clause. That clause refers really to money which may have been paid to Government under the agreement, and not to money recovered as land revenue.

However that may be, the basis of our decision is that S. 84 does not apply generally to all the consequences of a breach on the part of the plaintiff but only to a particular penalty provided for a breach of the condition as to the plaintiff performing any duty or act or abstaining from a particular act, and that we have to determine the compensation to be given to the defendant for non-fulfilment of this contract by the plaintiff.

The result, therefore, is that we vary the decree of the lower Court by allowing to the plaintiff Rs. 1,331, with interest from the date of the recovery of this amount up to the date of payment at six per cent. in addition to the amount of Rs. 101-2-6 already awarded by the lower Court.

Having regard to all the circumstances including the fact that according to our view the recovery of the remaining instalments as arrears of land revenue under S. 84 could not be justified, we direct that each party should bear its own costs throughout.

Decree varied.

1925 BOMBAY 231

SHAH, AG. C. J., MARTEN AND
FAWCETT, JJ.

John Over—Petitioner.

v.

Muriel A. I. Over—Respondent.

Civil Reference No 20 of 1923, Decided on 14th October, 1924, from the Dt. J., Poona.

(a) *Divorce Act (IV of 1869) Ss. 10, 12, 13 and 14—Wife admitting adultery—Caution against collusion is essential.*

The Court may act on the admissions of the wife although they are not supported by any

other evidence. But to rely entirely upon such admissions is highly dangerous, as collusion between husband and wife is quite possible. In each case the question will be whether all reasonable ground for suspicion is removed. Generally speaking it is desirable to insist upon evidence corroborative of the admissions.

[P. 232, C. 2; P. 233, C. 1.]

(b) *Divorce Act (IV of 1869) S. 11—Adulterer's name not known—Court should not lightly excuse absence of enquiry.*

Court should not lightly excuse a party from making any enquiry which he can reasonably be asked to make as to the adulterer. [P. 234, C. 2.]

(c) *Divorce Act (IV of 1869) S. 45—Civil P. C. O. 5, R. 17—Personal service of petition should be insisted on.*

Party should not be lightly excused from effecting personal service of the petition, should circumstances render that course desirable in preference to the practice of service by registered post [P. 234, C. 2.]

(d) *Evidence Act, S. 58—No pleading put in—Section does not apply.*

S. 58 normally relates to agreed statements of facts made between both parties to save time and expense at a trial. But where there is no agreement to admit facts, and no pleading has been put in by a party it cannot be said any such admission has been made in his pleading.

[P. 235, C. 2.]

(e) *Evidence Act, S. 58—Divorce cases—Section does not apply.*

S. 58 has in general no application to divorce cases. [P. 235, C. 2.]

I. J. Sopher—for Petitioner.

No appearance for Respondent.

Shah, Ag. C. J.—When this matter came before us on June 20 last, we directed the District Court to record further evidence as to the alleged adultery, and to examine the petitioner. The District Court has recorded further evidence. The petitioner has been examined on oath now, and his son also has given evidence. The respondent, the wife of the petitioner, has not appeared at any stage of the proceedings. The letters written by the wife to the petitioner are on the record. On the strength of the letters and the evidence given by the petitioner and his son, the learned District Judge has expressed his opinion that the adultery of the respondent with another person not known is proved. He held the letters written by the respondent to be conclusive.

The matter is now before us, and the learned pleader for the petitioner supports that view. The respondent has not appeared. In the evidence given by the petitioner, he stated that the respondent had committed adultery with one person named in the evidence in 1922; but there was no further evidence about it. He also stated that she had misconducted

herself with four or five men before she left his house. That also is not supported by any evidence. It appears that she ultimately left her husband's house in January 1923, and has not returned.

The principal question in the case is whether the letters written by the wife are sufficient in the circumstances of this case to justify the finding of adultery on the part of the respondent with an unknown person.

The learned pleader for the petitioner has informed us that he is not in a position now to prove the alleged adultery with the particular person named in the evidence in September 1922, as one of his two witnesses is dead, and the other is out of India. Nor is he in a position to establish his statement as to adultery with four or five persons before she left Kirkee. We have, therefore, to decide the case on the basis of the alleged adultery of the respondent with an unknown person after she left her husband in the beginning of 1923.

Before dealing with this question, I desire to refer to the necessity for great caution which has been recommended in the English cases on this point, to guard against the reasonable possibility of collusion between the husband and the wife.

In the case of *Robinson v. Robinson and Lane* (1) the observations of Cockburn, C. J., who delivered the judgment of the full Court, at pages 393 and 394, are very important:—

"Now the evidence, as has been before observed, consists entirely of admissions made by the wife herself; and here a question presents itself, as to how far the admissions of a wife charged with adultery unsupported by any confirmatory proof, can be acted upon as conclusive evidence on which to pronounce a divorce..."

"But as this Court is not a Court of ecclesiastical jurisdiction, nor bound in cases of divorce *a vinculo* by rules of merely ecclesiastical authority, it is at liberty to act, and bound to act, on any evidence legally admissible, by which the fact of adultery is established; and if therefore there is evidence, not open to exception, of admissions of adultery by the principal respondent, it would be the duty of the Court to act on such admissions, although there might be a total absence of all other evidence to support them. No doubt the

admissions of a wife, unsupported by corroborative proof, should be received with the utmost circumspection and caution; not only is the danger of collusion to be guarded against, but other sinister motives which might lead to the making of such admissions, if, though unsupported, they could effect their purpose, are sufficient to render it the duty of the Court to proceed with the utmost caution in giving effect to statements of this kind..."

"Nevertheless, if after looking at the evidence with all the distrust and vigilance with which, as we have said, it ought to be regarded, the Court should come to the conclusion, first, that the evidence is trustworthy; secondly, that it amounts to a clear, distinct, and unequivocal admission of adultery, we have no hesitation in saying that the Court ought to act upon such evidence, and afford to the injured party the redress sought for. The admission of a party charged with a criminal or wrongful act, has at all times, and in all systems of jurisprudence, been considered as most cogent and conclusive proof; and if all doubt of its genuineness and sincerity be removed, we see no reason why such a confession should not, as against the party making it, have full effect given to it in cases like the present."

In *Williams v. Williams and Padfield*, (2) with reference to the case, it is pointed out (p. 31):—

"The case cited is an authority for the proposition that the Court may act on the admissions of the wife although they are not supported by any other evidence. But I entirely concur with the observations of the Lord Chief Justice as to the great danger of relying entirely upon such admission. In each case the question will be whether all reasonable ground for suspicion is removed."

These observations of the Lord Chief Justice have been referred to in *Arnold v. Arnold*. (3)

We have, therefore, to consider whether in this case all reasonable ground for suspicion is removed. It is quite true that our attention has not been drawn to any case in which the adultery of a wife with an unknown person has been accepted as a fact on the strength of the admissions of the wife only. In the present case, however, on a consideration of all the

(1) [1858] 1 S.W. & Tr. 362=27 L. J. Mat. 91=5 Jur. (N.S.) 392

(2) [1865] L. R. 1 P. & D. 29=13 L. T. 610=35 L. J. Mat. 8.

(3) [1911] 38 Cal. 907=13 I.C. 491.

circumstances, I have come to the conclusion that all reasonable ground for suspicion is removed, and that there is no collusion between the husband and the wife.

The parties were originally married in 1902, and a decree for divorce was obtained by the present petitioner on the ground of adultery of his wife with another person in 1918. The decree was made absolute in 1919. The parties re-married in December 1920.

According to the evidence of the petitioner and his son the conduct of the wife in September 1922 was apparently open to objection, and she ultimately left the house of the husband in the beginning of 1923. Thereafter she wrote three letters, which are Exhibits 17, 18 and 19 in the case. In the first letter she says:—

"I wrote to you when leaving Pindi and told you that I had no intention of returning to you.

You know how utterly miserable I am with you, so I have placed a definite gulf between us by living with another man.

I have no intention of ever returning to you. A divorce under the circumstances is your only sensible act and also kind."

In other two letters she deliberately evaded giving any indication of her whereabouts, and practically confirmed what she had stated in the first letter, that she had been living with another man and had no intention of returning to the petitioner. I do not see any reason whatever in this case to suspect collusion. I have dealt with this case at some length in view of the difficulty which we have felt on account of there being no other corroborative evidence of the admissions of the wife. But, having regard to the circumstances, as disclosed in the evidence, I see no reason to doubt the genuineness of the admission made by the wife, and in the words of Cockburn, C. J. it is our duty to act upon such admissions, although there might be a total absence of all other evidence to support them.

The question whether in a given case the Court should consider the admissions of the wife as to adultery sufficient must necessarily depend upon the circumstances of that case. The fact that admissions are accepted as sufficient in one case can afford no reason whatever for accepting them in another case. The general considerations which would and should guide the Court are indicated in the judgment of

Cockburn, C. J. Subject to those considerations each case must be dealt with on its own facts and circumstances.

I would, therefore, confirm this decree. I may add that after writing my judgment I have had the advantage of reading the judgment of my learned brother Marten and I desire to make it clear that in divorce cases great care and caution are necessary in dealing with the admissions of parties and it is only the exceptional circumstances of a given case that could justify the Court in acting upon the admissions of a party as to adultery without any corroboration. Generally speaking as a matter of prudence it is desirable to insist upon evidence corroborative of the admissions.

Marten, J.—This matrimonial case presents exceptional features. It is a husband's petition founded on the alleged adultery of his wife with some person unknown. He has already been divorced from her once, viz. by a decree *nisi* passed by me on August 12, 1918, on the Original Side of this High Court, which decree was made absolute on March 3, 1919. He, however, married her again on December 22, 1920, at Poona. She left him from September 8, 1922, to October 7, 1922. It would appear that her husband then thought he had cause to complain of her conduct with a Captain Chamberlain who had been living with them, but who, the petitioner states, has since gone to Australia. What exactly the petitioner alleges took place between captain Chamberlain and the respondent is by no means clear on the evidence taken before the learned District Judge. But the petitioner deposes that he condoned "the offence" with Captain Chamberlain, and it is clear from the evidence of his son that there were disputes between the husband and wife over the latter's conduct with Captain Chamberlain.

Shortly afterwards, viz., about January 1923, the respondent left the petitioner again, and this time for good. She wrote to him in March 1923 from Rawalpindi stating, that she was not returning to the petitioner. Then in May 1923 she wrote to say that she was living with another man and did not intend to return, and the letter ended: "I have no intention of returning to you, a divorce under the circumstances is your only sensible act and also kind." She then gave her address as c/o Miss Reynolds, Presidency General

Hospital, Calcutta. Accordingly the petitioner instructed his legal adviser to write to the respondent there asking for her address, and also the name and address of the man she was living with. Her reply to that letter was: "I have no intention of giving the name or any information concerning the man I have been living with. That is no concern of Mr. Over's." At the same time she wrote to her husband: "Your letter received. No wily tricks of yours to get the name of the man I've lived with or the address by which you would find out will go down with me. I am not giving you any chance of getting damages, so you might as well give up the idea. I shall not write again and I tell you now finally that I am never coming back to you. I don't care to ask you for favours but should certainly like you to divorce me to know that I was quite free from you."

Under those circumstances this present petition was filed under S. 10 of the Indian Divorce Act 1869 for a dissolution of the marriage of 1920 by reason of the wife's adultery with an unknown man. The petition did not, as it ought to have done ask the Court to excuse the petitioner under S. 11 of the Act from making the alleged adulterer a co-respondent to the petition. This can be done under sub-S. (2) if the name of the alleged adulterer is unknown to the petitioner, although he has made due efforts to discover it. In the present case the petitioner has made no efforts to discover the name of the adulterer beyond asking his wife for the name. Nor did he even know where his wife was then living. Her address in the petition is given as "c/o Miss La Franc, Presidency General Hospital, Calcutta," but it does not appear why the name of Miss La Franc has been substituted for the name of Miss Reynolds. Service of his petition appears to have been effected by registered post on the respondent "c/o Miss La Franc," but the postal packet has been returned "Refused."

However, as the previous letters found the respondent, I am not prepared to say that this service by registered post should be rejected notwithstanding the difference in the names of the addressee. Nor, on the other hand, am I prepared to overrule the discretion of the learned trial Judge in excusing, as I must assume he did, the absence of the name of the co-respondent under S. 11 of the Act. But I

may express the hope that this case will be looked upon as an exception and not as the rule, and that the learned District Judge will not lightly excuse a party from making any enquiry which he can reasonably be asked to make, nor if necessary from effecting personal service of the petition, should circumstances render that course desirable in preference to the practice, often prevailing in our Courts, of service by registered post.

Unfortunately this petition has been heard by two successive trial Judges, and this is not as satisfactory a mode of trial as, if the case had been heard throughout by one Judge. The petition was originally decided by Mr. Waterfield on affidavit evidence. This mode of trial we refused to accept in the present case and directed a remand. The oral evidence on the remand was taken by Mr. Wild. The letter from the District Judge giving his views on the evidence purports to come from Mr. Wild, but is signed by Mr. Weston, the present Acting District Judge. I should however, infer that the opinion expressed is that of Mr. Wild and not of Mr. Weston.

The learned trial Judges do not seem to have felt any difficulty in this case and to have considered that the wife's letters were conclusive. It was indeed argued before us that, in a suit on a contract, the Court would normally grant a decree if the defendant had written a letter admitting the breach and the sum due, and therefore a different standard ought not to be adopted in this undefended divorce case, having regard to the above letters. This argument seems to me to show a complete misapprehension of the duties of the Court in dealing with divorce cases. The Court is there dissolving a marriage solemnised between persons professing the Christian religion, and its duties are of a totally different character from those in suits connected with the sale and barter of goods.

The sole jurisdiction of the District Court to dissolve Christian marriages is to be found in the Indian Divorce Act, 1869, and it is incumbent on the Court strictly to follow the statutory directions therein given. The District Court has no inherent jurisdiction in this respect, and its predecessors did not even have the old ecclesiastical jurisdiction of divorce a

mensa et thoro which was conferred on the Supreme Court of Bombay by the Supreme Court Charter of 1823. I need not, however, go into the history of the divorce jurisdiction in India and England. That is explained in *Wilkinson v. Wilkinson* (4). Turning then to the 1869 Act, S. 7 enacts: "Subject to the provisions contained in this Act, the High Courts and District Courts shall, in all suits and proceedings hereunder, act and give relief on principles and rules which, in the opinion of the said Courts, are as nearly as may be conformable to the principles and rules on which the Court for Divorce and matrimonial Causes in England for the time being acts and gives relief." S. 12 provides that "Upon any such petition for the dissolution of a marriage, the Court shall satisfy itself, so far as it reasonably can, not only as to the facts alleged, but also whether or not the petitioner has been in any manner accessory to, or conniving at, the going through of the said form of marriage, or the adultery, and has condoned the same." S. 13 provides that "In case the Court, on the evidence in relation to any such petition, is satisfied that the petitioner's case has not been proved, or is not satisfied that the alleged adultery has been committed... then and in any of the said cases the Court shall dismiss the petition." S. 14 provides in effect that it is only in case the Court is satisfied on the evidence that the case of the petitioner has been proved, and does not find any connivance or collusion that the Court is to pass a decree. No doubt S. 45 provides that "Subject to the provisions herein contained, all proceedings under this Act between party and party shall be regulated by the Code of Civil Procedure." But that provision, in my opinion, does not override the express directions in Ss. 7, 12, 13 and 14 to which I have already alluded.

Some reference was made, during the course of the case, to S. 58 of the Indian Evidence Act, and it was suggested that this section would render the letters of the respondent sufficient evidence, or as the trial judgment describes them, conclusive. That section runs: "No fact need be proved in any proceeding which the parties thereto or their agents agree to admit at the hearing, or which, before the hearing, they agree to admit by any

writing under their hands, or which by any rule or pleading in force at the time they are deemed to have admitted by their pleadings: Provided that the Court may, in its discretion, require the facts admitted to be proved otherwise than by such admissions."

That section normally relates to agreed statements of facts made between both parties to save time and expense at a trial. But on the facts here there is no agreement to admit facts. Further, as no pleading has been put in by the respondent, it cannot be said she has made any such admission in her pleading.

Moreover, in my opinion, this section has in general no application to divorce cases. I have never yet heard it even suggested that an English Divorce Judge would grant a divorce merely on an agreed admission of misconduct by the parties or their attorneys. If any such attempt was made, it would in all probability result in the suit being dismissed for collusion.

But in fact this section is controlled by S. 2 of the Indian Evidence Act, which provides that "nothing herein contained shall be deemed to affect any provision of any Statute, Act or Regulation in force in any part of British India and not hereby expressly repealed." Now the Indian Evidence Act was passed in 1872, and consequently the Indian Divorce Act, which was passed in 1869, was already in force at the date of the Evidence Act. Consequently the express provisions laid down in Ss. 7, 12, 13 and 14 of the Indian Divorce Act as to the requisites for a decree for divorce cannot, I think, be overridden by any such section as 58. On the other hand, I think these letters are clearly admissible in evidence as admissions within the meaning of Ss. 17, 18 and 21 of the Indian Evidence Act. See also *Rutherford v. Richardson* (5). But although a document may be admissible in evidence, the weight to be attached to it is quite another matter, and that is the real point of difficulty here.

The evidence before us in support of the petition particularly rests on three main points, *viz.*, (1) the alleged worthless character of the respondent and her past immorality; (2) her desertion of her husband and family; and (3) the letters written by her after her last desertion. There is no corroborative evidence of the wife's statement that she is living in adul-

(4) 1923 Bom. 821=47 Bo n. 848=25 Bom. L. R. 945.

(5) [1923] A.C. 1.

tery with another man. Captain Chamberlain is alleged in the petition to have gone to Australia. No other man's name is even suggested by the petitioner. Beyond her own letters there is nothing to show even where she is living nor whether alone or with any man. The case, therefore, is a very exceptional one in which to grant a decree and demands the greatest care and caution in approaching it.

The general rule of practice adopted in the English Divorce Court is thus stated in Halsbury, Vol. XVI, p. 478, Art. 981: "The evidence of the husband or the wife alone must be corroborated, either by a witness, or at least by strong surrounding circumstances; especially (the presence of witnesses notwithstanding) where a respondent has made admissions, or a confession; and even where a co-respondent has also confessed, a decree will be granted only if the Court is satisfied that there is no ground for suspicion."

No doubt in *Robinson v. Robinson and Lane*, (1) it was laid down that a decree can be granted on the mere confession of a wife. But it is to be observed that in that case, although the wife's diary was alleged to admit misconduct, the Court was not satisfied that it did, and so the petition was in fact dismissed. So in one sense the judgment was *obiter*. Further, that case was decided as long ago as 1859 when the divorce jurisdiction of the Court had only been in force for some two years, *viz.*, since the Matrimonial Causes Act 1857. The Court had, therefore, little or no experience of such cases to go on. As already stated, I think that such a confession is admissible in evidence, and I agree that there is no rule of law which absolutely precludes the Court from acting upon it. But as a rule of prudence the practice of the Divorce Courts has been in general not to act upon such confessions, unless corroborated.

The pleader for the petitioner was unable to assist us by reference to any authority, and I think that all the cases cited came from the Bench. The nearest case I have been able to find is *Getty v. Getty* (6). The head-note there rather states the effect of the decision than what the learned Judge actually said, but it runs as follows:—

"Although it is the general practice in matrimonial cases not to act and grant relief upon uncorroborated confessions of adultery, there is no absolute rule of prac-

tice and no rule of law precluding the Court from acting upon such uncorroborated evidence. The true test seems to be whether the Court is satisfied from the surrounding circumstances in any particular and exceptional case that the confession is true. If so satisfied, it is open to the Court to grant relief, notwithstanding the absence of independent corroborative testimony."

That was a very peculiar case, in which the husband and wife had been separated for several years. Subsequently the wife became a Christian Scientist, and in consequence she admitted that she had been unfaithful to her husband some nineteen years previously but she refused to give the name of the man nor any particulars about the alleged adultery. She, however, made certain statements to her solicitor Mr. Lupton, who was called by the petitioner at the trial and who was compelled by the Judge to answer certain questions as to whether she had admitted the adultery to him and what her reason was for refusing to give the name of the man. The learned Judge said that the solicitor's statement seemed to him very strong corroboration of the confession, and he proceeded (p. 338):—

"If Mr. Charles Lupton had not been called, I should have found myself with only the confession of the respondent, written more than two years ago and not since repeated, unless as implied by her saying in effect that the money due to her by the terms of the marriage settlement was not any longer her money. If it had not been for the evidence of Mr. Charles Lupton, I should have felt very great difficulty in acting upon the respondent's confession; but, having heard his evidence, I am of opinion that all doubt of its genuineness and sincerity has been removed, and that the respondent so dealt with her solicitor as to shew that this was not an untrue confession, but that out of mercy towards, or through fear of the result to the man, she was not going, to use a colloquial expression, to give him away. Having now, as I say, sufficient evidence before me to remove from my mind all reasonable ground for suspicion, I am satisfied that the wife's confession was true, having been confirmed long afterwards to her own solicitor, when she told him in effect that the adultery was committed shortly after she arrived in England, that it was not continued, but that

(6) [1907] P. 334=76 L.J.P. 158=98 L.T. 60.

out of fear for the consequence to the man she did not wish to disclose his name."

In the present case we have no such corroborative evidence as the learned Judge had in that case. We have, however a reason for the respondent wishing to shield the man, viz., that he should not be exposed to a claim for damages. In the previous petition in 1918, there had been a claim for Rs. 10,000 damages against the then co-respondent Lieut. Hunt, though in fact I awarded no damages at the trial.

The only case referred to by the pleader for the petitioner was an unreported case decided by me in which, according to him, I had granted a divorce on merely a letter written by a wife who had left her husband. It is curious that the pleader should know of this unreported case although he was unable to refer the Court to the ordinary authorities on the subject. But if it is thought by the Bar at Poona or elsewhere that this High Court will normally grant divorces on suitable letters written by a wife, they may take it that this is an entire misapprehension on their part, and that neither in the case alluded to nor in the present case is it to be taken that this Court intends to lay down any such practice. This illustrates the difficulty of giving the benefit of the doubt to a petitioner in a case near the line, for somebody else may use it as a starting point for some, even more doubtful case, or else try to induce some other Judge to think that a definite rule of practice has been laid down.

The petitioner's pleader did not have the file produced from the Original Side as he might have done, and so my learned brothers have not seen the particulars of that case. But I have since seen the file, and my notes of evidence and judgment, and the real circumstances are as follows. The suit was that of *Mitchell v. Mitchell*, No. 3444 of 1919. There the husband was an English soldier who had gone to fight first in Mesopotamia and then on the Indian frontier, but on returning home found his wife's manner completely changed. On his return from the frontier she denied him marital access, and subsequently she admitted to her husband that she had committed adultery with a private in another regiment. The husband was shortly afterwards transferred to Bombay. He asked his wife to go there, and said he was prepared to condone her past offence. She, however, declined saying that if she

came back he would always throw the past in her face. Subsequently she left him altogether and wrote a letter, somewhat similar to the one we have in the present case, intimating that she was living with another man although she did not actually mention his name. In that case the private was made a co-respondent but neither he nor the wife entered an appearance. The petitioner appeared in person and I cross-questioned him at considerable length. My notes of evidence have recalled this witness to my recollection. I remember that he gave his answers as an English soldier should, direct and to the point, and I was completely satisfied that what he told me was true. That being so, I held that there was no rule of law which absolutely prevented me from accepting his evidence corroborated as it was by the letters of the wife, and that though I thought the case was near the line, I ought to grant him a decree.

The decision I gave in that case can, if necessary, be supported by *Williams v. Williams and Padfield* (2). There the wife when challenged with adultery confessed it on the spot to the mother of the correspondent. So there was this additional circumstance, besides, the letters which were afterwards written by her. Moreover, this additional circumstance, if believed, tends to negative the risk of collusion which is a serious one in many undefended divorce cases.

If in the present case there was any corroborative evidence by the husband, e. g., if the respondent while living with her husband had been challenged by him with her conduct and had confessed adultery with a particular man with whom it afterwards appeared she had gone away the case would be quite different. The difficulty in the present case is, as I have said, that we have merely her letters to go on as to her adultery with some unknown man.

There are certain passages in the evidence taken on remand which would tend to suggest that the lady had committed adultery with Captain Chamberlain and with several other persons. The petitioner there stated:—

"In 1922 Capt. Chamberlain came to stay with us. I had reason to complain of his behaviour with respondent. While I was away from Kirkee I received a letter in September 1922 from respondent saying that she was leaving me and

not returning. I returned to Kirkee and she came back. I thus condoned the offence with Capt. Chamberlain. I tried to reform respondent; but in January 1923 she again left me and took my daughter. Before she left I had suspicions that she was corresponding with Capt. Chamberlain, and I heard that he had given her Rs. 6,000 to enable her to rejoin him."

Then later on he stated :—

"She has misconducted herself with four or five men. I have heard that she is now married."

In my opinion the learned trial Judge ought never to have allowed loose statements like these to appear on the depositions. When we asked the pleader what "offence" Captain Chamberlain was alleged to be guilty of he replied misbehaviour, and when we asked what the misbehaviour consisted of he practically was unable to answer. Similarly, when the pleader was asked how did the witness know that the respondent had misconducted herself with four or five men he could only answer that it was merely hearsay, and what the witness meant by saying "I have heard that she is now married" is left in complete obscurity. I think the Judge should have at once asked the witness what he meant by these statements, and what were his means of knowledge. The Judge would then have been able to decide how far the witness was speaking from his personal knowledge and how far he was merely repeating hearsay which of course is not evidence. We did give the pleader an opportunity of considering whether he was in a position to prove adultery against Capt. Chamberlain or anybody else, because if so the subsequent desertion by the wife might revive the adultery notwithstanding its condonation: [See *Copsey v. Copsey* (7).] But, having regard to Ss. 22 and 10 of the 1869 Act and to the necessity in general for the desertion to be for a period of two years or upwards in order to constitute a matrimonial offence on which certain decrees could be obtained, it may be that this suit would be premature if it was founded on that ground, inasmuch as a period of two years has not expired in the present case.

We are accordingly left to decide this case on the record in its present state which to me is far from satisfactory. But my learned brothers are satisfied on the

evidence that the confession of the wife is true, and under the circumstances I do not think I ought to differ from them. My mind has fluctuated a good deal during the course of the case, but one statement in the respondent's last letter to her husband is I think just sufficient to turn the scale in favour of the petitioner. I refer to the letter in which she alludes to the wily tricks of her husband, and states she is not going to give him any chance of getting damages. I have already stated in the previous divorce case in which Lieut. Hunt was a co-respondent, the present petitioner had claimed Rs. 10,000 damages. So although I did not award any damages to the petitioner, that claim may have caused annoyance to the guilty parties at the time. The wife would doubtless recollect this, and I think it unlikely that she would write to her husband in this way on the subject of damages, if in fact there was no man against whom a claim could be made. On looking at the former petition I see that the wife was there described as "until recently a Nursing Sister in Military service now discharged." The co-respondent Lieut. Hunt was described as "in the service of East African Railway, now on leave." On looking at my notes of evidence, which I have thought it permissible to do under the peculiar circumstances of this case, I find that the parties were first married as long ago as 1902, and that their matrimonial troubles first began during the war when without the knowledge of her husband the wife joined up as a military nurse and subsequently went to East Africa. That affords some explanation of the origin of the trouble which she has caused to her husband who appears to have been most considerate to her throughout. It may also explain why she gave an address by reference to a hospital at Calcutta. It is not however, suggested that she has since had anything more to do with Lieut. Hunt.

Under all the circumstances then of this exceptional case, I agree with my Lord the Chief Justice in thinking that the decree *nisi* may be confirmed.

But I wish to add this. I am much struck with the difference in the way in which divorce work is done in the District Courts as compared with the normal criminal and civil work. In the latter, and particularly in the criminal work, we usually get every assistance. If, for instance, a crimina

case depended on an accomplice's evidence then the trial Judge would be sure to deal carefully with the question whether there was any corroborative evidence. In practice the confession of a guilty party in a divorce case ought to be treated on somewhat similar lines of caution to those of an accomplice's evidence in a criminal case. And yet in the present case it was accepted almost as a matter of course. If this was the only instance of the kind, I would have regarded it as an exception. But in *Wilkinson v. Wilkinson* (4) and again in *Hewson v. Hewson* (8) this Court has had to comment adversely on the loose way in which divorce cases are at present conducted in the trial Courts. If it is once realised that an *ex-parte* case is sometimes the most difficult of all cases to decide because there is no counsel for the respondent to point out the deficiencies in the petitioner's case, and consequently it is left to the Court for itself to detect them. I feel sure that no cause will be given to us in the future for making adverse comments such as those which I have thought it my duty to make in the present case. The ideal which all we Judges, who have to exercise this difficult jurisdiction of Divorce, should I think aim at, is well expressed by Lord Sumner in *Russel v. Russell* (9), where he says (p. 736) :—

"The question cannot have been entirely absent in litigation until the last three or four years, and we know that in that period at any rate many decrees have been granted after and in consequence of the admission of a husband's evidence, which if applicable, this rule would have excluded. It is no answer to say that a husband's evidence of non-access has only been admitted to save expense and time. That is not the way in which matrimonial jurisdiction is or ought to be exercised. Decrees of dissolution of marriage are to be made only upon strict proof. Consent to a decree, direct or indirect, is inadmissible, nor is there any one present to make admissions, if the suit is undefended. In such cases, the Judge must and I doubt not does, watch vigilantly to see that the evidence on which he acts is such only as he is entitled to receive, and the rule in *Goodright's* case (10), if it applies at all is a striking one which could hardly be overlooked. The fact that both parties are

equally anxious to get a divorce is precisely a reason why the Judge should be absolutely strict as to proof. No consideration of saving time and trouble can be a legitimate ground for admitting illegitimate evidence."

Fawcett, J.—I concur with the judgment of the learned Chief Justice.

In my opinion the circumstances in the present case justify the Court in acting on the respondent's admission of adultery with an unknown man though there is no corroborative evidence on the point. I think that the Court can safely act on the respondent's admission as the real truth, and that all reasonable ground for suspicion of collusion is removed by the tone of the respondent's letters, her evident desire to shield the adulterer, and the history of her past conduct and relations with the petitioner as disclosed in the evidence (omitting what my learned brother Marten has pointed out to have been improperly allowed on the record).

At the same time, I agree that this is an exceptional case, and that the Courts should not, as a matter of prudence, ordinarily act on such confessions, without some corroborative evidence.

1925 BOMBAY 239

SHAH, AG., C. J. AND KINCAID, J.
Bai Nurjan Begam—Appellant.

v.

Hansraj Jethumal and Co.—Respondents.

Second Appeal No. 608 of 1923, Decided on 19th September 1924, from the decision of Asst. J. Poona in App. No. 160 of 1922.

Civil P. C., O. 34, R. 14—Money decree under a different mortgage—Rule does not apply.

Where there are simultaneous and different mortgages which could reasonably be treated as constituting one transaction the Court would be slow to allow the plaintiffs to resort to a device which would enable them to do something which it is the object of rule 14 to prevent. But where the transactions are distinct and independent, it does not matter if the plaintiffs seek to enforce the decree against the mortgaged property so long as the claim in respect of which they have obtained a decree is not a claim under the particular mortgage. Whether the claim arises under another mortgage or is a simple money claim cannot make any difference to the application of Rule 14.

[P. 240, C. 2].

A. G. Desai—for Appellant.

J. R. Gharpure—for Respondents.

Shah, Ag. C. J.—These appeals raise, question of law as to the interpretation of O. 34, R. 14. The plaintiffs obtained a mortgage in respect of two houses Nos 624 and

(8) 1924 Bom. 397—25 Bom. L. R. 467.

(9) (1924) A. C. 687.

(10) (1777) 2 Cowp. 591.

848 on July 1, 1914, from the defendants. There was a second mortgage in respect of the same houses in favour of the plaintiffs with which we are not directly concerned. On October 15, 1915, there was another mortgage in favour of the plaintiffs in respect of house No. 780 by the same parties. In 1917 about the same time the plaintiff filed two suits to recover rents due in respect of the mortgaged properties and for possession thereof. The rent was apparently due under rent-notes under which the mortgagors continued in possession as tenants of the mortgagees. In each suit they obtained a decree for possession as also for the rent claimed. Thus, on April 16, 1919, the plaintiffs had two decrees in their favour in respect of claims arising under these two distinct mortgages. They then applied to bring the property, mortgaged under the mortgage of October 15, 1915, to sale in execution of the decree passed in respect of the claim arising under the mortgage of July 1, 1914, and they applied for sale of the property mortgaged under the mortgage of July 1, 1914, in execution of the decree obtained by them in respect of the claim under the mortgage of 1915. The question that arose was whether in virtue of the provisions of rule 14 they could bring the mortgaged property to sale otherwise than by instituting a suit for sale in enforcement of the mortgage. The lower appellate Court has held that under rule 14 the plaintiffs were prevented from bringing the mortgaged property to sale otherwise than by instituting a suit in execution of the decree obtained by them for the payment of money in satisfaction of the claim arising under that particular mortgage. The plaintiffs' position was that they sought to bring the property to sale in execution of the decree for the payment of money in satisfaction of the claim arising not under that particular mortgage but under the other mortgage.

Defendant No. 2 has appealed to this Court from the orders passed by the lower appellate Court disallowing her contention; and in support of the appeals it is urged that both these mortgages should be taken really as practically one transaction constituting the mortgage within the meaning of rule 14, that both the claims should be treated really as arising under two mortgages, that quite apart from the circumstances whether the claim arises

under one mortgage or the other within the meaning of rule 14 the plaintiff really seeks to bring to sale the property mortgaged in execution of decrees in respect of claims arising under the mortgages taking both the mortgages together. On the other hand it is urged that these two are distinct transactions and that as the legislature has expressly limited the scope of rule 14 to claims arising under the mortgage, there is no reason why the plaintiff should not be allowed to proceed in execution against the mortgaged property if he seeks to execute a decree which has been obtained not in respect of a claim arising under the mortgage but otherwise. Speaking for myself, I do not think that the point is entirely free from difficulty, and it may be that where there are simultaneous and different mortgages which could reasonably be treated as constituting one transaction the Court would be slow to allow the plaintiffs to resort to a device which would enable them to do something which it is the object of rule 14 to prevent. But in the present case, I do not think that having regard to the wording of the rule the words 'the mortgage' could be read as applicable to both the mortgages. The transactions were quite distinct and independent; and it does not matter if the plaintiffs seek to enforce the decree against the mortgaged property so long as the claim in respect of which they have obtained a decree is not a claim under the particular mortgage. Whether the claim arises under another mortgage or is a simple money claim cannot make any difference to the application of rule 14. The wording of rule 14 is not the same as that of the repealed S. 99 of the Transfer of Property Act. Its scope is restricted to the case of a decree for the payment of money in satisfaction of a claim arising under the mortgage. I think that to read 'mortgage' in the singular as including 'mortgages' in the plural with reference to mortgages which are independent and cannot be rightly treated as forming one transaction of mortgage would involve a repugnancy in the subject and context. Having regard to the fact that the two mortgages here are quite independent, I am satisfied that the view taken by the lower appellate Court is right. We, therefore, dismiss both the appeals with costs.

Kincaid, J.—I agree.

Appeals rejected

1925 BOMBAY 241

Full Bench

MACLEOD, C. J. PRATT AND CRUMP, JJ.
Amarsangji Dungarji Jhala—Defendant—Appellant.

v.

Deepsangji Ravabhai Jhala — Plaintiff—Respondent.

Appeal from order No. 56 of 1923, Decided on 11th December, 1924, from the Order of the Sub. J., Ahmedabad in Appeal No. 404 of 1921.

(a) Civil P. C., S. 100—*Gujarat Talukdar's Act* (Bom. Act VI of 1888) S. 16—*Scope*.—16 Bom. 408 over-ruled.

No second appeal lies to the High Court from a decision of the Dt. Judge under S. 16 of the Act. 16 Bom. 408 Over-ruled. [P 241 C 2 P; 242 C 1]

(b) Civil P. C., S. 11—*Gujarat Talukdar's Act* (Bombay Act VI of 1888) S. 16—*Res judicata* applies.

The decision of the District Court under S. 16 of the Act does not bar a regular suit on the principle of *res judicata*. 30 Bom. 220 Approved. [P 242 C 2 P 243 C 1]

H. V. Divatia—for Appellant.

G. S. Rao and M. K. Thakore—for Respondent.

Macleod C. J.—The plaintiffs sued for a declaration that the decision in the Suit No. 2 of 1913 before the Talukdari Settlement Officer, in appeal No. 541 of 1916 of the District Court and second appeal No. 919 of 1919 in the High Court, was without jurisdiction, null and void, and not binding on the plaintiffs. That the plaintiffs owned one-thirty-sixths in Taiabhai Surasanji's property in Jalia village and that they were entitled to have the shares separated. The defendants pleaded that the suit was barred on the principle of *res judicata* owing to the proceedings before the Talukdari Settlement Officer. The trial Court held that the plaintiffs' suit was barred by *res judicata* and dismissed it. On appeal the First Class Subordinate Judge with appellate powers reversed the decision of the trial Court on the issue of *res judicata* and sent the suit back for trial on the remaining issues.

Defendants Nos. 1 to 12 have appealed to the High Court. Defendants Nos. 1 to 12 made an application No. 2 of 1913 to the Talukdar Settlement Officer, under S. 11 of the Gujarat Talukdars' Act, for partition and separate possession of their shares in the village of Jalia, a Talukdari

village, as recorded in the settlement register prepared under S. 5 of the Act. The present plaintiff and others disputed their title to the share claimed by them. The Talukdari Settlement Officer held the applicants to be entitled to the share specified in the settlement register as claimed by them. On appeal to the district Judge, under S. 16 of the Act, the decision of the Talukdari Settlement Officer was confirmed. A second appeal No. 919 of 1919 was filed in the High Court but was dismissed under Order XLI, rule 11. As the plaintiffs now ask for a declaration that the decision in that second appeal was without jurisdiction it is necessary for us to consider whether an appeal lies to the High Court from a decision of the District Judge under S. 16 of the Act.

In *Jamsang Devabhai v. Goyabhai Kikabhai* (1) it was held that the decision of the District Court on appeal from the Talukdari Settlement Officer was subject to a second appeal to the High Court. Sargent, C. J. said (p. 413). "We think that the effect of the concluding words of S. 16 of Act VI of 1888 is to give the decision of the District Court on appeal from the Talukdari Officer the same character in all respects as a decree from an ordinary suit before a subordinate officer, and that, therefore, like all such decrees, such decision is subject to second appeal to this Court. This view is assisted by the concluding words of S. 21, which shows that they must, if possible, be construed so as not to affect the High Court's jurisdiction." With the greatest respect we cannot agree. The High Court has jurisdiction to hear second appeals by virtue of the provisions of S. 100 of the Civil Procedure Code, which enacts that save when otherwise expressly provided in the body of the Code or by any other law for the time being in force an appeal shall lie to the High Court from every decree passed in appeal by any Court subordinate to a High Court on any of the grounds therein mentioned. Under S. 99 an appeal shall lie from every decree passed by any Court exercising original jurisdiction to the Court authorised to hear appeals from the decisions of such Court. The Talukdari Settlement Officer is not a Court exercising original jurisdiction, and it cannot be said that because S. 16 of the Act gives a right of appeal to the District

(1) [1891] 16 Bom. 408.

Judge from his decision, that decision is a decree within the definition in S. 2 (2) of the Civil Procedure Code. The District Court hears the appeal as if it were an appeal from a decree of a Court from whose decision the District Court is authorised to hear appeals, but that is a specific right of appeal based on an analogy, and the analogy cannot be extended further so as to entitle a dissatisfied party to take a second appeal to the High Court.

In *Hari v. Secretary of State for India* (2) it was held that the appellate jurisdiction could only come into play where there had been a decision of a Court, and that although a right of appeal to the High Court was given by S. 48 (II) of the City of Bombay Improvement Trusts Act from a decision of the Tribunal of Appeal if the President granted a certificate, the appeal was not competent because the local legislature had no power to control or affect by these Acts the jurisdiction or procedure of the High Court. Again, under S. 54 of the Land Acquisition Act I of 1894, an appeal lies to the High Court from the award of the Court in any proceedings under the Act, subject to the provisions of the Code of Civil Procedure applicable to appeal from original decrees. For many years appeals were admitted by the Judicial Committee of the Privy Council from appellate decisions of the High Court under that section, but in *Rangoon Botatoung Company v. Collector, Rangoon* (3) it was decided that such an appeal was not competent. Lord Macnaghten said (p. 839): "That section seems to carry the appellants no further. It only applies to proceedings in the course of an appeal to the High Court. Its force is exhausted when the appeal to the High Court is heard. Their Lordships cannot accept the argument or suggestion that when once the claimant is admitted to the High Court he has all the rights of an ordinary suitor, including the right to carry an award made in an arbitration as to the value of land taken for public purposes up to this Board as if it were a decree of the High Court made in course of its ordinary juris-

diction." This decision is directly in point and we must hold that the decision in *Jamsang Devabhai v. Goyabhai Kikabhai* (1) cannot be supported.

Whether the decision of the District Court under S. 16 of the Act or the decision of the High Court, assuming a second appeal lies, bars a regular suit on the principle of *res judicata* was considered in *Malubhai v. Sursangji* (4).

The facts were similar to those in the case before us.

There had been an original application to the Talukdari Settlement Officer under S. 11 of the Act. From his decision an appeal was preferred under S. 16 to the District Court and from that decree there was an appeal to the High Court.

The question of the competency of the High Court to hear that appeal was considered as concluded by the decision in *Jamsang Devabhai v. Goyabhai Kikabhai* (1). The plaintiffs then filed a suit to obtain the final decree of a Court of competent jurisdiction declaring them to be entitled to a share of a talukdari estate. It was contended that the decision in the previous proceedings constituted *res judicata* at any rate so far as concerned the present litigants who were parties to those proceedings. Jenkins, C. J. said (p. 224): "The law of *res judicata* is to be found in S. 13 of the Civil Procedure Code, and to make its terms applicable it must be shown that the Talukdari Settlement Officer is a Court of jurisdiction competent to try this suit. But this he clearly is not: he is an administrative officer and not a Court; and by no straining of words can he be described as a Court of jurisdiction competent to try this suit." It was further held, following *Toponidhee Dhurj Gir Gosain v. Sreeputty Sahanee* (5) and *Bharasi Lal Chowdhry v. Sarat Chunder Dass*, (6) that in considering a question of *res judicata* a Court must look to the powers of the Court in which the suit was instituted and not to the powers of the Court by which that suit was decided on appeal. The correctness of those propositions cannot be disputed. Reference may also be made to S. 11, Explanation II, of the Civil Procedure Code. Consequently the principle of

(2) [1903] 27 Bom. 424, 5 Bom. L. R. 431.

(3) [1912] 40 Cal. 21=39 I.A. 197=16 C.W.N. 961=12 M.L.T. 195=16 C.L.J. 245=23 M. L.J. 276=14 Bom. L.R. 833=10 A.L.J. 271=5 Bur. L.T. 205=6 L.P.R. 150=16 I.C. 188=(1912) M.W.N. 781 (P.C. 216)

(4) [1905] 30 Bom. 220=7 Bom. L.R. 871.

(5) [1880] 5 Cal. 832=6 C.L.R. 305.

(6) [1895] 23 Cal. 415.

res judicata cannot apply to the previous proceedings between the parties to this suit, and the decision of the appellate Court was right. The appeal is dismissed with costs.

Pratt, J.—I agree.

Crump, J.—I agree.

Appeal dismissed.

1925 BOMBAY 243

MACLEOD, C. J. AND COYAJEE, J.

Chimanlal Pranjivandas Gheewalla —
Applicant.

v.

Emperor—Opposite Party.

Criminal Application for Revision No.15 of 1925, Decided on 28th January, 1925 against conviction and sentence passed by First Class Mag., Surat.

Penal Code, S. 294-A—Publication of terms for prizes on horses winning at Derby races is offence.

The accused issued a circular for the sale of tickets for prizes on horses winning at the Derby races, on starters, and for other special prizes. The circular stated that the "Sweep will be closed on...and the draw under the supervision of the patrons stated in the tickets will take place on...Prize winners will be notified by telegrams"

Held: that the accused published a proposal to pay a sum for the benefit of any person, on any event or contingency relative or applicable to the drawing of any ticket, lot, number or figure in a lottery and was liable to punishment. It was not necessary that the payment proposed to be made should be made by the person advertising.

[P 243 C 2; P 244 C 1]

A. G. Desai—for Applicant.

Judgment.—The petitioner was charged under S. 294-A, Indian Penal Code, for publishing during the months of April and May last a circular of the so-called lottery of the Athlone Club Annual Sweep, popularly known as the Derby Sweep, to be drawn on June 4, 1924, for selling tickets thereof. The Magistrate convicted him and sentenced him to pay a fine of Rs. 25, in default to undergo simple imprisonment for eight days.

The petitioner applies to this Court in revision. The following are the terms of the circular issued by the petitioner.

"Annual Sweep on the Derby in Aid
of St. Peter's Building Fund
of the Athlone Club.

June 4th 1924,

Prizes.

1st Horse £. 5,000	Rs. 75,000.
2nd Horse £. 2,500	Rs. 37,500.
3rd Horse £. 1,000	Rs. 15,000.
Divided amongst	
Unplaced. £. 1,000	Rs. 15,000.
50 Special Prizes of £. 25	Rs. 875 each.
160 Special Prizes of £. 10	Rs. 150 each.

The Sweep will close on the 23rd May 1924, and the Draw under the supervision of the patrons stated in the tickets will take place on May 26, 1924. Prize winners will be notified by telegrams.

The above Sweep tickets can be obtained from the undersigned. Price of each ticket Rs. 10 only. On a draw a commission of 6¼ per cent. will be deducted from the prize amount. Money in advance.

A few tickets left. The favour of orders solicited."

Section 294-A runs as follows:—

"Whoever keeps any office or place for the purpose of drawing any lottery not authorized by Government shall be punished with imprisonment of either description for a term which may extend to six months, or with fine, or with both.

And whoever publishes any proposal to pay any sum, or to deliver any goods, or to do or forbear doing anything for the benefit of any person, on any event or contingency relative or applicable to the drawing of any ticket, lot, number or figure in any such lottery shall be punished with fine which may extend to one thousand rupees."

It is contended that the petitioner has not thereby published any proposal to pay any sum for the benefit of any person relative or applicable to the drawing of any ticket, lot, number or figure in any such lottery, that is to say, a lottery such as is referred to in the first paragraph of the section. The case appears to us to be sufficiently covered by the decision in *Queen-Empress v. Mancherji Kavasji Shapurji* (1). In that case the proprietor of a Bombay newspaper who published an advertisement in his paper relating to a Melbourne lottery was held to be punishable under S. 294-A, Indian Penal Code. The first question for the Court to decide was whether a foreign lottery was within S. 294-A. We have nothing to do with that question in this case. The second point was whether the publication of a proposal to pay any sum for the benefit of any person on any event or contingency relative or applicable to the drawing of any ticket, lot, number or figure in any such lottery, was punishable. The Court said at p. 100:—

"To answer the second question we have to determine what is the meaning of the word 'published' in this section. We do not find any definition of the word in

(1) [1885] 10 Bom. 97.

The Indian Penal Code, and we must, therefore, take that word in its ordinary sense. Thus taking it, it seems to us that if A sends an advertisement to B, the proprietor of a newspaper, for publication, B is punishable as well as A for such publication."

Now clearly the circular which was published by the petitioner did contain a proposal to pay within the meaning of the second paragraph of S. 294-A, Indian Penal Code. It was not necessary that the payment proposed to be made should be made by the person advertising. That was decided by the case we have referred to. The circular states that "the Sweep will be closed on May 23, 1924, and the draw under the supervision of the patrons stated in the tickets will take place on May 26, 1924, Prize winners will be notified by telegrams." It is clear, therefore, that the petitioner published a proposal to pay and the conviction was right. We reject the application.

Application rejected.

★ 1925 BOMBAY 244

SHAH, AG. C. J. and KINCAID, J.

Raghavendra Gururao Naik—Defendant—Appellant.

v.

Mahipat Krishna Shollapur—Plaintiff—Respondent.

Second Appeal No. 178 of 1922, Decided on 10th September, 1924, from the decision of the Asstt. J., Belgaum, in Appeal No. 231 of 1920.

★ *Contract Act, S. 145—Surety keeping alive his liability by payments within time—Decree against surety—Limitation over against Principal debtor—Payment under decree is not wrongful.*

The act of the surety in keeping his liability alive by *bona fide* payments of interest within time is not such as could make the payment by him in pursuance of the decree obtained against him by the creditor wrongful within the meaning of the section, though such payment may be made at a time when the creditor's remedy against the principal debtor has been barred by limitation. [P. 246, C. 2.]

S. R. Parulekar for *A. G. Desai*—for Appellant.

H. B. Gumaste—for Respondent.

Shah, Ag. C. J.—The facts which have given rise to this second appeal are these: On October 8, 1895, the father of defendant No. 2 executed a money bond

for Rs. 2,000 payable after five years in favour of one Shidhraj Desai. The present plaintiff and defendant No. 1 were sureties in respect of this debt. The principal debtor did not pay the debt nor did he acknowledge his liability to the creditor, and the claim against him became time-barred on October 9, 1903. The sureties, however, paid one rupee as interest first on October 5, 1903, and then on October 1, 1906. Shidhraj sued the present plaintiff and defendant No. 1 on the bond in 1909, and obtained a decree against them, as the claim was kept alive by the payment of interest on two occasions before the expiration of the period of limitation. Thereafter he recovered from the present plaintiff different sums on different occasions. It appears that in respect of certain sums realised from the plaintiff, he had filed suit against defendant No. 1 the surety, and defendant No. 2 as representing the principal debtor. We are not concerned with these suits. In fact it appears from the judgment of the trial Court that one of the suits was pending at the time of the judgment. A sum of Rs 800 was paid to Shidhraj on September 1, 1915, during the pendency of the application for execution of the decree obtained by Shidhraj against the sureties. The present suit was filed on September 2, 1918, to recover the said sum of Rs. 800 just within three years against defendant No. 1, his co-surety, and defendant No. 2, the son of the principal debtor. Defendant No. 1 did not appear to contest the suit. Defendant No. 2 raised various defences and several issues were raised. The learned trial Judge held that defendant No. 2 was liable for the payment made by the plaintiff in satisfaction of the decree obtained by the original creditor against him in the suit of 1909. It is not necessary for the purposes of this appeal to refer to the various issues in detail. Accordingly a decree was passed for the amount claimed against defendant No. 2, and for a moiety of that amount against defendant No. 1.

Defendant No. 2 appealed to the District Court, and the learned Assistant Judge, who heard the appeal, came to the same conclusion as the trial Court in respect of the liability of the defendant No. 2 as the principal debtor in respect of the sum paid by the surety in satisfaction of the decree obtained against him by the original creditor, and confirmed the decree

of the trial Court. Both the lower Courts have dealt with this case very carefully.

In the appeal before us, on behalf of defendant No. 2 it is urged that he is not liable in respect of this sum paid by the surety, that at the date when the suit was filed against the surety in 1909, the claim against the principal debtor had become time-barred long since, that as regards the present plaintiff and the co-surety, the claim was kept alive by their own acts consisting of the payments of interest on two occasions: that under S. 145 of the Indian Contract Act, the surety is entitled to recover from the principal debtor whatever sum he has rightfully paid under the guarantee, but no sums which he has paid wrongfully, and that the sum paid under the circumstances of this case must be treated as a sum paid wrongfully within the meaning of the section. There is no reported decision of any High Court directly bearing on this point; but there is a decision of the Punjab Chief Court in *Suja v. Pahlwan* (1) upon which the appellant has relied.

On the other hand, on behalf of the plaintiff it is contended that though the claim of the creditor against the principal debtor might be time barred, it was open to him to keep the debt alive with a view to get more time for payment of the debt, which he was undoubtedly liable to pay at the time when he paid interest to keep the debt alive, that in any case when he paid the sum in satisfaction of the decree passed against him in respect of his liability as a surety, he made the payment rightfully under the guarantee, within the meaning of S. 145 of the Indian Contract Act, and that he is entitled to recover it from the principal debtor, quite independently of the consideration whether the claim of the original creditor was barred against the principal debtor or not.

We have considered the arguments urged on both sides, and though the point is not covered by any authority which is binding upon us, we have carefully considered the arguments put forth in the judgments of the learned Judges in the case of *Suja v. Pahlwan*. S. 137 provides that mere forbearance on the part of the creditor to sue the principal debtor does not discharge the surety in the absence of any provision in the guarantee to the

contrary. It has been held by this Court in *Hajarimal v. Krishnarav* (2) that though the claim against the principal debtor may be barred, the creditor can enforce his right against the surety. In this case the effect of the various sections of the Indian Contract Act has been considered with reference to a state of facts under which by operation of law, though the claim against the principal debtor was barred, it was enforceable against the surety. The same view was taken in *Sankana Kalana v. Virupakashapa Guneshipi* (3) and that view is also accepted by the Calcutta and Madras High Courts in *Krishto Kishori Chowdhraia v. Radha Romun Munshi* (4) and *Subramania Aiyar v. Gopala Aiyar* (5). Though this view is not accepted by the Allahabad High Court, so far as we are concerned, we are bound by the decisions of this Court; and it is not disputed before us that though the claim against the principal debtor may be barred, it is not necessarily barred against the surety. In other words, the liabilities of the principal debtor and the surety to the creditor are not absolutely interdependent, and though the remedy as against the one may be barred, it does not follow that it is necessarily barred as against the other.

Further, it has been held by this Court in *Gopil Diji v. Gopil bin Sonu* (6) that the payment of interest by the debtor within limitation does not give a fresh starting point for limitation against the surety. Having regard to the *ratio decidendi* of this case, and that of *Brajendra Kishore Roy Chowdhury v. Hindustan Co-operative Insurance Society Ltd.*, (7) it is clear that the surety may effectively keep alive his liability by his own act without in any way effecting the plea of limitation in favour of the principal debtor. According to these two cases, the principal debtor and the surety can each keep his liability alive, though the remedy of the creditor may be barred as against the other on account of limitation. That being so, it is clear that in 1909 the surety was liable in respect of the

(2) [1931] 5 Bom. 647.

(3) [1883] 7 Bom. 146.

(4) [1885] 12 Cal. 330.

(5) [1909] 33 Mad. 308=20 M. L. J. 633=9 M. L. T. 321.

(6) [1903] 28 Bom. 248=5 Bom. L. R. 1020.

(7) [1917] 44 Cal. 978=21 O. W. N. 432=39 I. O. 705=23 C. L. J. 238.

(1) [1877] 30 P. R. 1878.

amount for which he had stood surety at the time the original bond was passed by principal debtor. In keeping the debt alive against himself, he cannot be said to have acted improperly or wrongfully. If he was not in a position to pay, it was open to him to secure extension of time for payment by keeping his liability alive; and it is clear in this case that as a decree was passed against him in favour of Shidhraj in the suit of 1909, he was bound to pay the decretal debt. It is not reasonable, in my opinion, to hold that he paid the sum wrongfully within the meaning of S. 145 of the Indian Contract Act when he paid it in satisfaction of a decree passed against him. It must be treated as a sum rightfully paid under the guarantee. The liability of the principal debtor to indemnify the surety is provided for by S. 145 and is in no way dependent upon the existence of his original liability to the creditor. It may be said that this view may lead to an indefinite extension of the period of the liability of the principal debtor, which cannot be enforced directly against him on account of the bar of limitation. It is possible that in some cases, as in the present case, it may so happen; but I am unable to think that there is any particular hardship or injustice to the principal debtor involved in his being called upon to indemnify the surety. The cause of action in respect of his liability to indemnify the surety arises when the surety in fact pays the amount under S. 145 of the Indian Contract Act. Even if it involves some hardship, I do not think it can afford any reasonable basis for holding that the payment made by the surety under circumstances, such as we have in this case, is wrongful. I may point out that in the present case it has been definitely found by the lower Courts that there was no collusion whatever between the surety and the original creditor. The only ground upon which it is suggested that the payment made by the surety under the decree against him is wrongful within the meaning of S. 145, is that by his own act he has kept alive his liability which would otherwise have become unenforceable on account of limitation. That is not a sufficient ground for disallowing the right which is given to him under S. 145 of the Indian Contract Act.

I am unable to agree with the reasons given in *Suja v. Pahlwan* for the con-

trary view. It is not necessary to attempt to generalize as to when a payment can be said to have been wrongfully made by the surety within the meaning of S. 145. It is enough for the purposes of this case to observe that the act of the surety in keeping his liability alive by *bona fide* payments of interest within time is not such as could make the payment by him in pursuance of the decree obtained against him by the creditor wrongful within the meaning of the section.

No other point is urged in support of the appeal. It is not clear why there are different suits in respect of payments made by the plaintiff from time to time. As no point is made on that score before us, it is not necessary to consider it.

We, therefore, dismiss the appeal and confirm the decree of the lower appellate Court with costs to respondent No. 1.

Kincaid, J. I concur

Appeal dismissed.

1925 BOMBAY 246

MACLEOD, C. J. AND CRUMP, J.

Ragho Larman Lohar — Plaintiff—
Petitioner.

v.

Govind Vaman Dhapre—Defendant—
Respondent.

Civil Extraordinary Application No. 2 of 1924, Decided on 13th November, 1924, against the decision of First Class Sub, J., Ratnagiri, in Sm. C. Suit No. 212 of 1923.

Provincial Small Cause Courts Act, (9 of 188) S. 23 S. C.—Suit transferred to regular list—Re-transfer to S. C. list is barred.

Where a suit was originally filed as a Small Cause Court suit by the plaintiffs and on the application of the defendant it was transferred to the regular list and became a regular suit until the record was closed and where without stating reasons in writing the Judge re-transferred the case back to the Small Cause Court list.

Held; he had no power to do so. [P 247 C 1]

S. R. Parulekar—for Petitioner.

G. B. Chitale—for Respondent.

Macleod, C. J.—This suit was originally filed as a Small Cause Court suit by the plaintiffs. On the application of the defendant it was transferred to the regular list and became a regular suit until the record was closed. For reasons which do not appear to have been stated

in writing the Judge re-transferred the case back to the Small Cause Court list. He then found on the issues without giving any reasons and dismissed the suit with costs.

That procedure was clearly irregular. There having been an order by a competent Court that the suit should be tried as a regular suit and not as a Small Cause Court suit, the Court would have no power to set aside that order and transfer the case back to the Small Cause Court list. The decree, therefore, must be set aside and the case must be remanded to the Subordinate Judge to continue the hearing from the time when the wrong order was made transferring the suit to the Small Cause Court list. The rule is made absolute with costs.

Rule made absolute.

1925 BOMBAY 247 (1)

MARTEN AND PRATT, JJ.

Maruti Vithu—In re.

Criminal Ref. No. 86 of 1924, Decided on 8th December, 1924, from the Dt. Magistrate Nasik.

Criminal P. C., S. 435—Withdrawal of cases suspends jurisdiction.

When an order is made by the District Magistrate under S. 435 calling for the record and proceedings pending before a Magistrate with a view to withdrawing the case and transferring it to another Magistrate the jurisdiction of the former Magistrate is suspended, and he is not therefore entitled to record a composition of the offence and acquit the accused under S. 345 though the case may not have been actually transferred to the other Magistrate. [P. 247, C. 2.]

Judgment.—The complainant filed a complaint on July 2, 1924, against two accused of various compoundable offences. On July 15, 1924, the District Magistrate in revision called for the papers, under S. 435 of the Criminal Procedure Code, with a view to withdraw the case from the First Class Magistrate and refer it for trial to another Magistrate. As a matter of fact he did so order on August 15. But in the meanwhile on July 31, the Magistrate recorded a composition of the offence and acquitted the accused under S. 345, Criminal Procedure Code.

The District Magistrate refers the case to us on the ground that the jurisdiction of the First Class Magistrate Mr. Deshpande ceased after the order had been made

calling for the papers. We think the contention of the District Magistrate is correct. When the order was made calling for the record and proceedings with a view to withdrawing the case and transferring it to another Magistrate the case was no longer on the file of the Magistrate and his jurisdiction was suspended. We, therefore, think that the order of acquittal made on July 31 is void and of no effect. We therefore, return the record and proceedings with a direction that the case should now proceed before the Court of the Sub-Divisional Magistrate at Nasik to whom it was referred by the District Magistrate. This is of course without prejudice to the rights of the parties to effect a fresh composition before that Magistrate.

Reference accepted.

1925 BOMBAY 247 (2)

SHAH, AG. C. J. AND KINCAID, .

Purshottam Bhanji & Co—In re.

Civil Ref. No. 11 of 1924, Decided on 2nd October, 1924, Ref. made by the Commissioner of Income Tax Bombay.

Income-Tax Act (1922), S. 2 (14) — Income-tax rules — Application for registering must be made on or before due date of return under S. 22 (2).

An application for registering a firm under R. 2 of the Income-Tax Rules 1922, must be made on or before the date on which a return is due under sub-S. (2) of S. 22. [P. 248, C. 1, 2.]

Kanga and J. C. Bowen — for Commissioner of Income-Tax.

Daphtary, instructed by Captain and Vaidya—for Purshotam Bhanji & Co.

Shah, Ag. C. J.—The question in this reference also has not been categorically formulated. We shall state the facts to make the point, which has been referred to us for our opinion, clear.

It appears that the assessee in this case, namely, the firm of Messrs. Purshotam Bhanji & Co., were served with a notice on May 15, 1923, under S. 22 (2) of the Income Tax Act, 1922, to make a return in the prescribed form with reference to the total income during the previous year. According to the provisions of that sub-section the return was required to be made in thirty days from the date fixed in the notice, i. e., by June 15, 1923. No return was made in time. The assess-

ing authority did not make the assessment on the income but called upon the firm to produce the account books. On December 3; the firm submitted the return to the authority. Under sub-S. 3 of S. 22 if a return is submitted at any time before the assessment is made, the return so made shall be deemed to be a return made in due time under that section. Accordingly the return was accepted. It appears, however, that on that day a representative of the firm applied for registering the firm under rule 2 of the Indian Income-tax Rules, 1922. This application was refused by the Income-tax Officer. Then there was an appeal, and ultimately this reference was asked for by the assessee under S. 66 of the Act for the opinion of this Court on the question whether the application made for registering the firm was in time at the date on which it was presented.

The expression "registered firm" is defined by S. 2 (14) of the Act in these terms:—

" 'Registered firm' means a firm constituted under an instrument of partnership specifying the individual shares of the partners of which the prescribed particulars have been registered with the Income-tax Officer in the prescribed manner."

This manner has been prescribed by the proper authority under powers conferred upon that authority under S. 59 of the Act. These rules are to be found in the Bombay Government Gazette 1922, Part I, at page 1496 Rule 2 of these rules is in these terms:—

"Any firm constituted under an instrument of partnership specifying the individual shares of the partners may, for the purposes of clause (14) of S. 2 of the Indian Income-tax Act, 1922 (hereinafter in these rules referred to as the Act), register with the Income tax Officer the particulars contained in the said instrument on application on this behalf made by the partners or by any of them on or before the date on which a return is due under sub-S. (2) of S. 22 of the Act."

It is clear on the facts stated in the reference that this application was not made on or before the date on which the return was due under sub-S. (2) of S. 22 but long after that date. The matter appears to be so clear that it is difficult to understand why a reference was sought in this case. It is urged on behalf of the firm that the application must be deemed to have been made on or before the due date if it is

made in fact before the assessment is made: or in other words if the return is accepted under sub-S. 3 of S. 22. though made after the due date under S. 22 (2), the application for registering the firm can also be made before the assessment is made. It is difficult to justify this contention by any possible rule of construction which can be applied, and we are clear that the application was not made in the prescribed manner that is in accordance with rule 2 of the rules framed with reference to the manner in which the application for registering a firm is to be made under the Indian Income-tax Act. It is hardly necessary to refer to any authority. But it seems that this point was raised in *In the matter of Lalla Mal, Hardeo Das* (1) and without any difficulty in that case the learned Judges came to the conclusion which we have expressed here.

Costs of this reference to be paid by the assessee on the Original Side scale.

(1) 1924 All. 137=45 All. 1=21 A.L.J. 703=4 L.R.A. Civ. 451.

1925 BOMBAY 248

MACLEOD, C. J. AND CRUMP, J.

Kokamal Madhoram—Defendant—Appellant.

v.

Gulabsingh Gurudatsingh — Plaintiff—Respondent.

O. C. J. Appeal No. 37 of 1924, Decided on 1st December 1924.

Civil P. C., O. 6, R. 17—Substitution of new plaintiff cannot be allowed.

A plaintiff cannot by amendment be allowed to substitute one plaintiff for another. [P. 251, C. 1]

Where the plaintiff has sued as principal on a contract alleged to have been made with him by the defendants for the import of certain goods on c. i. f. terms, he cannot claim to sue on the same plaintiff the defendants as their agent who has, on receipt of the shipping documents, cleared and delivered the goods to them as his principals.

[P. 251, C. 1]

Coyajee—for Appellant.

Kemp—for Respondent.

Macleod, C. J. — The plaintiff filed this suit in the Court of Small Causes, Bombay, alleging that the defendants requested him to order out aniline dyes on certain terms as to commission. On the account which subsisted between the plaintiff and the defendants with regard to

that transaction he claimed Rs. 1,061-2-6 with interest from Kartak Sud 1, 1977 to Aso Vad 30, 1978, amounting to Rs. 145-1-6.

The defendants applied to the High Court for a transfer on the strength of an affidavit in which they alleged—

(1) that the defendants did not request the plaintiff to order out goods to them ;

(2) that defendants indented for goods from an Italian firm La Iridescente ;

(3) that the said firm supplied the goods to the defendants through the plaintiff as agent of the firm ;

(4) that plaintiff had no right to sue in his own name since he was the agent of a disclosed principal ;

(5) that the defendants had a claim against the said firm for shortage and late delivery amounting to Rs. 4,000 against the balance of price of the goods supplied. To ascertain the amount an account would have to be taken of all the goods supplied from time to time ;

(6) that the defendants counter-claimed against the plaintiff for such amount as would be found due on taking such account.

The plaint, though undated, must have been filed in 1922.

On June 19, 1923, an order was made for a transfer of the suit to the High Court on the defendants depositing the amount of the claim and Rs. 400 for costs in Court.

Affidavits of documents were filed by both parties and on August 13 the defendants took out a summons for an order that the preliminary issue "whether the suit as framed by the plaintiff was maintainable" should be determined immediately.

Lengthy affidavits were filed and on August 20 the Chamber Judge, after hearing counsel, directed that the suit should be set down for trial on September 17. Why this suit should have been given preference over the numerous older suits then waiting for trial is not apparent. The case was eventually heard for eight days before Fawcett, J. from January 18-29, 1924.

The following issues were raised :—

1. Whether the defendants' contract for certain aniline dyes out of which the suit has arisen was with the plaintiff or the firm of La Iridescente ?

2. Whether the plaintiff's suit is merely in respect of the amount of custom duty and expenses incurred on those goods or is in respect of the balance of the whole account of those goods from the beginning ?

3. Whether in clearing those goods the plaintiff acted as agent of the defendants ?

4. Whether in the event of its being held that the plaintiff was the agent of La Iridescente either in the transaction of clearing the goods or of the sale thereof, the plaintiff can maintain the suit ?

5. Was struck out.

6. In the event of its being held that the suit is maintainable whether it was a term of the contract that the goods should be immediately shipped and delivered to defendants before Diwali 1976 (October 1920) ?

7. Whether the defendants directly or indirectly agreed with the plaintiff that the latter should supply the dye known as Congo Red 12 B to the defendants and if so, at the price charged by him ?

8. Whether the plaintiff had been guilty of late delivery ?

9. In the event of its being held that goods were delivered late, are the defendants liable for the higher customs duties that had to be paid on account of such late delivery ?

10. Whether the defendants are entitled to damages and if so to how much on account of the late delivery after the goods arrived in Bombay Harbour ?

11. General issue.

The learned Judge in the early part of the judgment pointed out the difficulties which had arisen, first owing to the erroneous statements in the plaint, and, secondly, to the fact that there was no formal written statement on the record and no counter-claim. However he allowed the plaintiff to go on without amending his plaint, and allowed the defendants to pursue their counter-claim without its being specifically stated in the pleadings, and observed that some rule should be framed to secure improvement in such matters, when a suit was transferred from the Small Causes Court. The difficulties which had arisen could have been surmounted if the proper proceedings had been taken in Chambers. When the summons of August 13 was before the Judge the plaintiff could have applied for a proper written statement and counter-

claim, while the defendants could have asked on the strength of the documents then before them for an amendment of the plaint.

The important documents were :—

(1) Letter dated August 10 from La Iridescente to the defendants offering certain goods.

(2) Letter dated August 15 from defendants to La Iridescente accepting certain goods out of those offered and asking for five Congo Red 12 B Lion cases to be included. The letter concludes : "As arranged between us you (La Iridescente) will arrange with Mr. Gulabsingh (plaintiff) to clear the goods on arrival and deliver the same to me against payment."

(3) Sale note by La Iridescente to the defendants of the goods accepted by the defendants with the following addition : "Congo Red 12 B Lion is on special contract with Mr. Gulabsingh, therefore I have passed these orders to him and shall request him to execute same at equal price and terms as 111 B 405 quality (4-10 per lb.)"

On a reference to the account annexed to the plaint it will be found that it contains no item relating to Congo Red 12 B. As a matter of fact plaintiff sent six cases of this number to the defendants at Agra.

It is difficult to find any justification for the inclusion of issue No. 7 in the suit. The plaintiff had actually brought a suit in the Small Causes Court against Khimchand, who was acting as defendants' agent when the sale note of August 18 was received for the balance of Rs. 83 due on this transaction. The defendants contended that the price was 4-10-0 per lb. and not 5-2-0, and claimed in this suit to set off Rs. 203 as shown in their account of August 30, 1920, referred to by the Judge at p. 89, line 13, of the Printed Book, which, however, I cannot find in the index to Exhibits at the beginning of Part III.

It was sufficiently embarrassing to deal with a plaint which had to be abandoned, and with a counter-claim which was not made in proper form and without any particulars. To deal with an item which had nothing to do with the plaintiff's claim, and of which no mention was made in the pleadings could only tend to increase the embarrassment.

It must first be noted that the plaintiff's claim was for the balance due on an account for goods supplied to the defendants at their request.

That claim failed entirely, as the Judge finds and as Exhs. B, C and A clearly show the goods were supplied to the defendants by La Iridescente. The plaintiff, however, without any amendment was allowed to continue the suit on the footing of his being an agent of the defendants to clear the goods which they had ordered from La Iridescente. Defendants wanted to show that plaintiff was the agent of La Iridescente and not of the defendants and with this object desired to cross-examine on this question. The cross-examination was disallowed on the ground that the contention was absurd in view of the agreement evidenced by Exh. C, that with the consent of the defendants the plaintiff should clear the goods on arrival and deliver them to defendants on payment.

At first sight it would seem clear that La Iridescente were to arrange with plaintiff to clear the goods as they arrived and deliver them to the defendants on payment, in which case the plaintiff would be the agent of La Iridescente. Mr. Kemp has pointed out that the contract was on c. i. f terms and therefore La Iridescente had only to hand over the documents to the defendants in exchange for the price. This may have been the intention, but Exh. C says that first the agent of La Iridescente was to arrange with plaintiff to clear the goods and to deliver them to the defendants on payment. Consequently defendants should have been allowed to cross-examine the plaintiff's witnesses to ascertain what actually happened.

But to my mind it was a fatal error on the part of the learned Judge to allow the plaintiff to continue the suit on the original plaint. The written statement of the defendants was a complete answer to it, but by a continuance of the proceedings defendants were eventually barred from pressing any claim they may have had against La Iridescente for damages under the contract incurred owing to late delivery. It may be said that they might have filed an action against La Iridescente, but the plaintiff was suing on the contract himself, and consequently as long as the plaint was on the file they

were justified in claiming damages against him.

Now the learned Judge might have allowed the amendment, but instead of doing that he allowed issues to be raised as if the plaint had been amended; but we cannot reconstruct from the issues the pleadings as they should have been framed before issues were raised or evidence led. We must consider ourselves whether the plaint could have been amended according to the rules which are usually observed by the Court when an application for amendment is made. The most important rule is that a plaintiff cannot by amendment be allowed to substitute one plaint for another and the plaintiff would have had to do this for an amendment to have been of any use to him. He sued as principal on a contract alleged to have been made with him by the defendants for the import of certain goods on c. i. f. terms. He would then have been entitled to recover the price of the goods in exchange for the documents. No question would arise with regard to the payment of custom dues or landing charges. He wants now to sue as the defendants' agent who has on receipt of the shipping documents cleared and delivered the goods to his principal. That is obviously a claim based on an entirely different cause of action, and the plaintiff should have been told to file a fresh suit, and the present suit should have been dismissed.

This is the order we must make now. We regret it, but the only other alternative would be to direct fresh pleadings to be drawn, and to send this case back for re-trial, when the evidence which we think was wrongly excluded would have to be recorded. We do not think we are justified in imposing this burden on the defendants apart from the fact that we have no desire to depart from the rule referred to above. However leniently the rules regarding the amendment of pleadings in this country should be construed to prevent a failure of justice, it would certainly impede the administration of justice if this particular rule were not strictly observed.

The history of this case is a lamentable example of what can happen when it is disregarded altogether, and a plaintiff, even without an amendment, is allowed to go to trial on some cause of action which cannot be ascertained from any definite source. The defendants are not

wholly free from blame. They claimed a set-off for the small sum of Rs. 203 on a contract which was entirely outside the suit. It could only have been dealt with as a counter claim, but from the record a considerable amount of evidence was taken on it, and the Judge has devoted a considerable portion of the judgment to the discussion whether the plaintiff could charge the defendants Rs. 4-10-0 or Rs. 5-2-0 for the six cases of dyes which he sold them.

We think, therefore, that the plaintiff must pay to the defendants only half their costs in the Court below, and all their costs of the appeal.

Appeal allowed.

1925 BOMBAY 251

SHAH, AG. C. J. AND KINCAID, J.

Commissioner of Income-Tax—Referee.
v.

Haji Jamal Nur Mahomed & Co. — Opposite Party.

Civil Ref. No. 14 of 1924, Decided on 2nd October, 1924, Ref. made by Commissioner of Income-Tax Bombay.

Income Tax Act, (1922) S. 10 (1) (IX)—Payment on capital advanced, out of profits—No allowance is due.

Payments to be made in certain proportion out of the profits on the capital advanced for the purposes of the business cannot be treated as expenditure incurred solely for the purpose of earning such profits or gains within the meaning of clause IX of sub-S. (2), of S. 10. [P 252, C 2]

Kanga instructed by J. C. Bowen—for Commissioner of Income-Tax.

B. J. Desai instructed by Motichand and Devidas for Assesseees.

Shah, Ag. C. J. — As the question upon which we are required to express our opinion is not categorically formulated, we may state the essential facts and the question before proceeding to express our opinion thereon.

The assesseees in this case are three brothers who are doing business in the name of Messrs. Haji Jamal Nurmahomed & Co. They attract capital for the purpose of their business by means of borrowings from persons who are described as "Mudibhagidars" under an agreement with them. The arrangement is that instead of the Mudibhagidars being given any interest on the advances made by

them to this firm, they receive certain specified shares in the profits of the business, and they are not responsible for the losses, if any. It is common ground that they are not partners in the business. In the year under consideration this firm made a profit of Rs. 1,27,810-9-6. Out of that according to the agreement with the Mudibhagidars, they have to pay Rs. 63,065-1-3 for the advances made by the various Mudibhagidars. The question that arises on this reference relates to this sum of Rs. 63,065-1-3 payable to the Mudibhagidars for advances made by them to this firm. With reference to that, the question is whether they are entitled to an allowance under S. 10 (2) (ix) of the Indian Income Tax Act (XI of 1922). Under this clause they would be entitled to an allowance in respect of any expenditure (not being in the nature of capital expenditure) incurred solely for the purpose of earning such profits or gains.

After a consideration of the arguments urged on both sides we are of opinion that this sum cannot be treated as expenditure incurred solely for the purpose of earning such profits or gains within the meaning of this clause. Our reasons for this opinion may be briefly stated. In the first place, the advances made by the Mudibhagidars are clearly in the nature of capital borrowed for the purposes of the business. With reference to the allowance to be made in respect of the capital borrowed for the purposes of the business, there is an express clause, *viz.*, clause (iii), of that sub-section. Under that clause the allowance can be made for the amount of the interest paid where the amount of interest in respect of capital borrowed is not in any way dependent on the earning of profits. In the present case, admittedly, the amount payable to the Mudibhagidars is dependent upon the earning of profits. So even if the payments of certain portion of the profits to the Mudibhagidars are to be treated as being in lieu of interest within the meaning of clause (iii) as they are dependent on the earning of profits, the profits would not be liable to any deduction or allowance in respect thereof. It would be rather an anomalous result if under clause (iii), which is directly applicable to capital borrowed for the purposes of the business, an allowance cannot be made, still it should be capable of being made under clause (ix). There is considerable force in

the argument urged on behalf of the Crown that in this case, if an allowance cannot be made under clause (iii), it cannot be made at all. Still we have to consider the argument urged on behalf of the assessee whether this can be treated as expenditure incurred solely for the purpose of earning such profits or gains. Without attempting to define the exact scope of this clause, it seems to us to be sufficient to say that payments to be made in certain proportion out of the profits on the capital advanced for the purposes of the business cannot be treated as expenditure incurred solely for the purpose of earning such profits or gains within the meaning of clause (ix) of sub-S. (2), of S. 10. We are, therefore, of the opinion that the assessee is liable to be charged in respect of this sum payable to the Mudibhagidars and are not entitled to any deduction claimed by them.

Costs of this reference to be paid by the assessee on the original side scale.

Reference answered.

1925 BOMBAY 252

MACLEOD, C. J. AND CRUMP, J.

Ibrahim Fazilbhoy Joomabhoy—Appellant.

v.

International Banking Corporation—Respondent.

O. C. J. Appeal No. 91 of 1924, and suit No. 2317 of 1922, Decided on 6th December, 1924.

Negotiable Instruments Act (XXVI of 1881) S. 33 — Draft against individual accepted on behalf of corporation—Acceptance is invalid.

Where a person against whom a bill of exchange is drawn by name, accepts the bill for or on behalf of a corporation of which he is a member there is no valid acceptance of the bill. [P. 254, C. 1]

B. J. Desai and Munshi—for Appellants.

Coltman and M. C. Setalvad—for Respondent.

Macleod, C. J.—The plaintiffs stated that they were the payees and holders in due course of seven bills of exchange drawn in London by Alfred Mumford and Co. Ltd. addressed to the defendant firm of Fazalbhoy Joomabhoy & Co. personally and without qualification as on various dates and amounts all payable sixty days after sight. The defendant firm of Fazal-

bhoy Joomabbhoy & Co. accepted all the bills as payable at the plaintiff bank and signed their acceptances "for or on behalf of the Eastern Commercial Corporation."

The plaintiffs claimed that such words did not affect the firm's personal liability. The bills were all dishonoured by non-payment on their due dates.

Fazalbhoy Joomabbhoy, a partner in the defendant firm, died on July 15, 1922, and the plaint was amended by making defendants Nos. 1, 2 and 3, his heirs and legal representatives, together with defendants Nos. 4 and 5, the remaining partners, the defendants on the record. The plaintiffs prayed that the defendant firm (this was wrong, as the individual partners were sued after the amendment) should be ordered to pay the sum of Rs. 58,774-13-9, the total of the bills, with interest at eight per cent. on the various amounts from the respective due dates and notarial charges. In the written statement it was pleaded that the plaintiffs were not the holders in due course of the seven bills of exchange and that defendants were not liable on those bills.

Defendants were secretaries and agents of the Eastern Commercial Corporation Limited a joint stock company and as such had power to draw, accept, endorse, negotiate and sell bills of exchange and hundies.

The Corporation had indented from Messrs. Alfred Mumford and Co. for several lots of goods by several indents and it was arranged that the latter firm should draw bills of exchange on the Corporation in respect of the said goods.

Some of the bills in respect of goods so indented for by the Corporation were drawn on Fazalbhoy Joomabbhoy & Co. After the bills were received in Bombay, they were sent by the plaintiff bank to the Corporation for acceptance. The Corporation, on September 2, 1920, returned the seven bills in suit duly accepted by them along with other bills drawn on the Corporation. The defendants said the bills in suit were accepted on behalf of or on account of the Corporation and the terms of the acceptance excluded the personal liability of the defendants, and amounted to a distinct disclaimer by the defendants of any personal liability and gave the plaintiff bank sufficient notice thereof. They relied on the law or the custom of merchants in

Bombay for the contention that when a bill was drawn or accepted "for or on behalf of" a joint stock company by its secretaries and agents, that expression was meant to signify that the bill was drawn or accepted on behalf of or on account of the company, and excluded the personal liability of the secretaries and agents so signing on behalf of the company. After the plaint was amended defendants Nos. 1, 2 3 and 5 put in a written statement in identical terms.

At the trial the following issues were raised :—

(1) Whether plaintiff bank were holders in due course for value?

This was admitted by defendant's counsel.

(2) Whether acceptance of defendants was on account and on behalf of the Eastern Commercial Corporation Ltd.?

The answer was, the defendants have accepted the bills and are liable as acceptors.

(3) Whether according to custom and usage in Bombay signature of one agent for or on behalf of the joint stock company does not signify the bill is due or accepted on behalf of the company?

(4) Whether the said form of acceptance and signature on the bills in suit is not by law or usage a distinct disclaimer of defendants' personal liability?

The answer to these two issues was that evidence of the mercantile usage sought to be proved did not affect the case.

Accordingly the defendants were held liable for the amount remaining due on the bills.

No oral evidence was led and the only documents exhibited were the drafts, a statement of advances made against the drafts, and a statement of accounts.

The Judge says that it was admitted that the bills were drawn against certain yellow metal sheets consigned to the Corporation, and that there were prior consignments, the bills in respect of which were drawn on the Corporation. It is unfortunate that a specimen of one of these bills was not exhibited. But in the absence of any evidence we may assume that the bills in suit were drawn on the defendants by inadvertence, and that the defendants accepted them in the way they did under the belief that they were drawn as usual on the Corporation. They could not possibly have intended to accept the bills themselves.

Under S. 33 of the Negotiable Instruments Act no person except the drawer of a bill of exchange can bind himself by an acceptance. On the face of the bill we may say at once that there was no acceptance by the defendants' firm on whom they were drawn; the acceptances were by the Corporation as strangers to the bills, and the plaintiff bank should have at once noticed the defect and taken such steps as were possible to get it remedied. The learned Judge remarked that the sole question was whether there was any acceptance by defendants, or did they intimate by the term of their signature that they were not accepting. An acceptance on the company's name of a bill drawn on themselves would not be an acceptance at all.

We agree and we also admit the principle to be followed in such cases as this, that we should construe the document if we possibly can *ut res magis valeat* and not *ut res magis pereat*. But if the proper construction is clear on the face of the document there is no room for applying the principle. Were these bills accepted in the company's name? Counsel was asked in the course of the argument how a bill drawn on the company would have been accepted, and he had to admit the bill would have been accepted in exactly the same way as the bills in suit. It is difficult to see, therefore, how there is any room for ambiguity. If the defendants, when accepting a bill drawn on the company, accepted it in this form, that form must be taken as excluding their own personal liability, and yet when they accept a bill drawn on themselves in the same form it is argued that they have not excluded their personal liability. The same words cannot have a different meaning according as the bill is drawn on the company or on the defendants. Counsel would be forced to admit that the defendants were liable personally on the other bills drawn on the company and accepted by them.

The Judge mainly relied on the cases of *Mare v. Charles* (1) and *Herald v. Connah* (2). Neither of those cases by itself would support his conclusion, but he appears to have considered that their cumulative effect would be sufficient. In the first case a bill was drawn on one W.

Charles and accepted by him as follows: "Accepted for the company. Payable at the Union Bank, William Charles Purser." Lord Campbell, C. J. pointed out that if the words of an instrument could reasonably bear an interpretation making it valid, they must construe them so as to make it valid, and William Charles must be taken to have intended to accept and not to refuse a bill drawn on himself. Unless he accepted the bill drawn on him personally in the sense that he rendered himself personally liable, he did not accept at all. On any other construction what he wrote on the bill must have amounted to a refusal to accept it. But it was clear he intended that the bill should not be dishonoured but accepted and they must construe what he had written *ut res magis valeat*. For, no person could, by accepting a bill drawn on another, alter the contract between the drawer and drawee. There must be a distinct disclaimer of personal liability, *e. g.*, where the defendant signed *per pro*, and those words were by mercantile usage equivalent to a signature of the person for whom the "per procurator" signed.

In *Herald v. Connah* (2) a bill of exchange was drawn on Henry Connah, General Agent of L'Unione Compagna D'Assimagine and was accepted thus: "Accepted, payable at 8 York Street, Manchester, on behalf of the company, H. Connah." The judgment of Bramwell B. is instructive as showing that owing to the special circumstances of the case, notably the fact that the company was carrying on business abroad, the Court was determined if possible to make the defendant liable. He said:—

"We must look to the instrument itself, and see what the parties intended, as that intention appears on the face of the document.....I agree with the remark that has been made, that it may be there is no valid acceptance; but it is to be presumed in favour of a valid acceptance unless the acceptor unmistakably notifies that he is not accepting in accordance with the effect of the draft..... Now I hold that the right way for a person who is accepting for another, to notify that he is so accepting, is for him to use such words as 'accepted for' or *per proc'*...The natural meaning of the words 'on behalf of' is that the defendant accepted as between himself and the com.

(1) [1856] 2 El. & Bl, 978=25 L.J.Q.B. 119=2 Jur. (N. S.) 234=4 W.R. 267.

(2) [1876] 34 L.T. 885.

pany for their account, but that he did accept it."

The learned Baron would, I presume, have held that defendants in this case had excluded their personal liability. But whatever authority those cases may have had before 1882, the question with regard to the liability of a person signing a bill is set at rest in England by S. 26 of the Bills of Exchange Act:—

"Where a person signs a bill as drawer, endorser or acceptor, and adds words to his signature indicating that he signs for or on behalf of a principal, or in a representative character, he is not personally liable thereon: but the mere addition to his signature of words describing him as an agent, or as filling a representative character, does not exempt him from personal liability."

S. 28 of the Negotiable Instruments Act 1881 is much to the same effect, only it enacts when an agent is liable personally.

It is doubtful, however, whether these sections really apply when the question is whether the acceptance on the document is the acceptance of the drawee. Just as Bramwell B. in *Herald v. Connah* (2) took into account that the bill was drawn on a foreign company, so in this case we have to consider the circumstances in which these bills were accepted so as to ascertain whether the defendants must be taken to have intended to accept and not to refuse a bill drawn on them, or whether they have unmistakably notified that they were not accepting in accordance with the effect of the draft. It seems unfortunate that the Judge did not allow evidence with regard to the status of "Secretaries and Agents" to a joint stock company in India. But it may be taken as common knowledge that company management is different in India to what it is in England, and that in the great majority of companies the entire management rests with the secretaries and agents according to the terms of their agreements with the company subject to the supervision of the directors. When, therefore, the defendants used the form of signature which they used when acting as secretaries and agents for the Corporation, and especially when accepting the prior bills drawn on the Company, can it be a reasonable interpretation that they intended to make themselves personally liable for the bills, and is it not perfectly clear that they unmis-

takably notified that they were not accepting in accordance with the effect of the draft? I may put it in another way. If the plaintiffs had taken the bills to their solicitor after acceptance and asked him whether the bills had been duly accepted, he must inevitably have advised them that the acceptances were not in order. Whether the signature is a repudiation of personal liability is one for the Court to decide. But the learned Judge concludes by saying that the defendants cannot avoid the conclusion to be drawn from the statement in their letter of September 2, 1920, which contains these words "We are herewith sending you the above draft duly accepted by us," that the acceptance whether by the company or by themselves is a good acceptance. The letter was annexed to the original written statement of the defendants but was not exhibited at the hearing nor was it relied on during the argument before us. Clearly it does not carry the case any further as the letter is signed in the same form as the acceptances. Fully recognising that we should, if we possibly can, give effect to the principle of construing these acceptances *ut res magis valeat*, we are constrained to hold that there was no acceptance by the defendants of the bills in suit. Appeal allowed and suit dismissed with costs in both Courts.

Crump, J.—I agree.

Appeal allowed.

★ 1925 BOMBAY 255

MACLEOD O. J., AND CRUMP, J.

Kanaiyalal Nanalal Desai—Appellant.

v.

The Secretary of State for India—Respondent.

Appeal No. 64 of 1924, Decided on 24th November 1924, from the order of Dt. J. Surat, in Suit No. 57 of 1924.

★ *Specific Relief Act, S. 45—Suit to declare electoral lists illegal and restrain elections thereunder S. 45 applies.*

A suit, for a declaration, that the preparation and publication of the lists of voters for a certain Local Board is illegal, void, *ultra vires*, and that no valid election of the members of the Dt. Board could take place under the said lists, and for an injunction restraining the Collector of the District from himself or by his subordinates holding elections of members of the District

Local Board under the alleged illegal lists, is of the nature contemplated by the provisions of S. 45 of the Specific Relief Act. S. 42 of the Specific Relief Act, therefore, has no application to the case. [P 256 C 2]

H. V. Divatia—for Appellant.

Kanga and S. S. Patkar—for Respondents.

Judgment—The plaintiff filed this suit against the Secretary of State for India in Council and the Collector of Surat asking for the following reliefs :—

(1) That it may be declared that the preparation and publication of the lists for voters for all general and Mahomedan constituencies of the District Local Board of Surat was illegal, void, *ultra vires*, and no valid election of the members of the District Local Board of Surat for the term commencing on from the 1st day of January 1925 could take place under the said lists ;

(2) For an injunction restraining the Collector of Surat from himself or by his subordinates holding elections of members of the District Local Board of Surat for the term commencing on and from the 1st January 1925 under the alleged illegal lists.

He then applied to the District Judge for an *interim* injunction.

After hearing arguments the Judge, while holding that he had no jurisdiction to grant the injunction, said :—

“Now the only effective relief which the plaintiff has prayed for is the injunction restraining the Collector from himself or through his subordinates holding elections of members of the District Local Board. What the plaintiff seeks is in substance a writ of mandamus or a writ in the nature of *quo warranto*. It is a high prerogative writ of a very extensive remedial nature. If this Court has power to grant the writ, then undoubtedly it would be proper to make this rule absolute by granting the plaintiff a temporary injunction in the terms prayed for. The writ such as is claimed by the plaintiff is principally used for public purposes and to compel the performance of public duties. This is not a suit under any specific provisions of any specific Act : nor is it a suit for the declaration of the plaintiff's right to vote and stand as a candidate for election which would be a suit of a civil nature (I. L. R. 24 Cal. 107); nor is it a suit to establish any legal character to which the plaintiff is entitled

under the provisions of S. 42 of the Specific Relief Act. The present suit is in my opinion suit of the nature contemplated by the provisions of S. 45 of the Specific Relief Act.”

This is a perfectly correct exposition of the substance of the plaintiff's claim and the Judge was clearly right in holding the suit was of the nature contemplated by S. 45 of the Specific Relief Act. The plaintiff's pleader, however, in arguing that that decision was wrong seeks to lead the Court away from the real issues in the case by asking us to consider not the relief claimed by the plaintiff but the statement in his plaint with regard to his own personal right to be put on the list of voters, although no relief is claimed in respect of such right. We are not concerned in this case with the question whether the plaintiff is entitled to vote, whether his name has been placed on the wrong list of voters, or whether his name has been omitted from the list in which he says his name ought to be. He sues as a member of the public for a declaration that the Collector in the performance of his duties with regard to the District Local Board elections has not performed his duties in the proper way, has done that which he ought not to have done, or has left undone that which he ought to have done, and that in consequence of such illegal action the defendant should be restrained from holding the elections. S. 42 of the Specific Relief Act, therefore, has no application whatever to this case. The only section which can possibly apply is S. 45. There can be no doubt that the District Judge has no jurisdiction to make any order which would be in the nature of a mandamus in a suit under S. 45 of the Specific Relief Act. That jurisdiction has been given only to the High Courts mentioned in the section, and it can only be exercised within the local limits of their ordinary original civil jurisdiction. The appeal, therefore, must be dismissed with costs.

Appeal dismissed.

1925 BOMBAY 257

MACLEOD, C. J., AND COYAJEE, J.

The Jubilee Mills, Ltd.—Appellant.

v.

The Commissioner of Income Tax—Respondent.

O. C. J. Appeal No. 111 of 1924, Decided on 5th February, 1925, from the decision of Mulla, J.,

(a) *Income Tax Act* (1918), S. 51—Application for refund—S. 51 does not apply.

An application for refund of income-tax already paid by mistake is not in the course of assessment under the Act and it does not come within S. 9. [P. 258, C. 1]

(b) *Income Tax Act* (1918) S. 26—Section does not provide for appeal to Commissioner.

S. 26 only relates to a mistake in the demand of any assessment, and cannot enable the discontented assessee, who has paid the amount demanded from him, to re-open the question of the assessment. The section provides for the rectification of mistakes caused by the demand not corresponding to the assessment, and does not provide for an appeal to the Commissioner from the order of the Collector under S. 26 either rectifying the mistake or refusing to rectify a mistake on an application made by the assessee. [P. 258, C. 1]

Chiman Lal Setalvad, B. J. Desai and B. K. Desai—for Appellant.*Kanga*—for Respondent.

Judgment.—This is an appeal from the order of Mr. Justice Mulla discharging a rule nisi taken out by the petitioners calling upon the Commissioner of Income Tax, Bombay, to appear and show cause why he should not be ordered to refer the questions set out in Ex. F, and in para 8 of the petition, together with his opinion thereon to this Court for its decision. The petitioners are a joint stock company incorporated and registered in Bombay on June 16, 1920. They were required by the Collector of Income Tax to make a return of their income for assessment for the year 1921-22. On October 27, 1921, the petitioners lodged accounts for the year ending June 30, 1921. Upon that the Collector issued notices of assessment for income tax and super tax for the year 1921-22, which were subsequently amended, and the amended notices were issued on January 3, 1922. The petitioners paid the income tax and the supertax demanded in the notices on February 6, 1922. In October 1922 the petitioners alleged that they had discovered that the Income tax Authorities had made a mistake in levying income tax and super-

tax on the basis of the accounts for the twelve months, ending June 30, 1921. Accordingly in November 1922 they made a representation to the Senior Income-Tax Officer pointing out the mistake and claiming refund of the income-tax already paid. The Senior Income Tax Officer replied by his letter of November 18, 1922, that the assessments to income tax and super tax levied against the company for 1922-23 was in order and needed no revision, and if they were dissatisfied they might appeal to the Assistant Commissioner of Income Tax, Bombay, against the same. It will be seen that the Senior Income Tax Officer did not refer to the assessments for 1920-21 which was the assessment which the petitioners were complaining about in their letters to him.

The petitioners then applied to the Commissioner of Income Tax who gave his decision on June 19, 1923, as follows:—

"The petitioners' attention is drawn to the fact that the assessment against the Jubilee Mills, Ltd., objected to in their petition dated March 23, 1923, was levied in the year 1921-22 under proviso to S. 19 of the Act, 1918. The notice of assessment was issued on December, 8, 1921. The tax after some minor modification was paid by the Company on February 6, 1922. No appeal against the assessment was made as provided for by S. 21 (1) (2) of Act, 1918. The undersigned declines to take action under S. 51 of Act, 1918."

A further representation was made to the Commissioner of Income Tax to which he replied on July 24, 1923, declining to accede to the petitioners' request to make a reference to the High Court. On February 8, 1924, the Commissioner, who had since received a letter from the petitioners of the 6th instant, which is not on the record, replied that it had been decided to make reference to the High Court in the matter of the income tax and super tax assessment of the Jubilee Mills, Limited, for the year ended March 31, 1922, under S. 51 of the Indian Income Tax Act VII of 1918, and that the same would be made in due course.

Mr. Hartley, who was then Commissioner, seems to have gone on leave, and on April 29, 1924, his successor, Mr. Vachha, replied to the petitioners' letter of February 6, that he declined to reconsider the order already passed in the case

on June 19, 1923, which we have just referred to.

The petitioners then took out this rule. Mr. Justice Mulla relying on the decision of this Court in *In re Panalal Ganeshdas*, (1) held that the application would not come within S. 51 of the Act of 1918, as it was not made in the course of any assessment under the Act or any proceeding in connection therewith other than a proceeding under Chapter VII. We think that that decision is correct. When the assessment has been determined by the Collector, he shall serve on the assessee a notice of demand in the prescribed form as provided by S. 20 of the Act. If the assessee objects, he may apply by petition to the Commissioner for relief against any order of the Collector in respect of such assessment, which petition shall ordinarily be presented within thirty days of receipt of notice of demand. If the petition against the assessment is not presented, then it must be taken that the assessment is final and no application can be made under S. 51.

The petitioners then contend that the application to the Collector was made under S. 26 of the Act, under which the Collector may at any time within one year from the date of any demand made upon the assessee, rectify any mistake in connection therewith which has been brought to his notice by such assessee, and make a refund to such assessee in respect thereof. That section only relates to a mistake in the demand of any assessment, and cannot enable the discontented assessee, who has paid the amount demanded from him, to reopen the question of the assessment. The section provides for the rectification of mistakes caused by the demand not corresponding to the assessment, and does not provide for an appeal to the Commissioner from the order of the Collector under S. 26 either rectifying the mistake or refusing to rectify a mistake on an application made by the assessee. Therefore, in this case it was not competent to the petitioners to apply to the Commissioner of Income Tax to refer the question which had arisen to the High Court, on the ground that it referred to the interpretation of certain of the provisions of the Act, or of some rule thereunder.

The appeal must be dismissed with costs.

Appeal dismissed.

1925 BOMBAY 258

MACLEOD, C. J., AND CRUMP, J.

Mahadev Laxman Satardeker,—In re.

Criminal Ref. No. 72 of 1924, Decided on 13th December, 1924, from the Dt. Mag. Ratnagiri.

Criminal P. C., S. 203—Dismissal of complaint does not bar fresh complaint, but complainant must inform Magistrate about previous dismissal.

Where an accused person has been once discharged by a magistrate under S. 203 the same case can be enquired into by other Magistrate again. But the complainant is bound to inform the magistrate before whom he makes a fresh complaint that his previous complaint was dismissed. [P. 259, C. 2]

Judgment.—This is a reference by the District Magistrate of Ratnagiri. One Mahadeo Laxman filed a complaint on April 15, 1924, under Ss. 448, 506 and 350, Indian Penal Code, in the Court of the First Class Magistrate at Malvan against Sitaram Narayan Tavde, Havildar of the 11th Mahratta Light Infantry then stationed at Secunderabad, and three others. The complaint was that the accused entered the complainant's house on April 8, 1924 beat him and threatened to kill him. The First Class Magistrate verified the complaint and dismissed it under S. 203 of the Criminal Procedure Code on April 16, 1924.

The complainant then filed a fresh complaint on the same facts against the same accused in the Court of the Bench Magistrates of the Second Class at Malvan on April 25, 1924. The fact of his previous complaint having been dismissed by the First Class Magistrate was not mentioned by the complainant in his complaint to the Bench Magistrates. The Bench Magistrates entertained the complaint, recorded the complainant's verification statement, and ordered the issue of process under S. 448, Indian Penal Code. Accordingly, a bailable warrant was issued for the arrest of the accused Havildar, who brought to the notice of the District Magistrate the above facts in an application for transfer of the case.

On examining the papers the Magistrate was of opinion that the Bench

(1) 1922 Bom. 345=46 Bom. 707=23 Bom. L. R. 127.

Magistrates were wrong in taking up the complaint, which was already dismissed by the First Class Magistrate. Such a complaint was held to be without jurisdiction and the proceedings were set aside by the High Court of Allahabad in *Queen-Empress v. Adam Khan* (1). The District Magistrate, therefore, requested the Registrar to kindly move the High Court to set aside the proceedings pending in the Court of the Bench Magistrates at Malvan.

In *Queen Empress v. Adam Khan* (1) it was held that when a competent tribunal has dismissed a complaint another tribunal of exactly the same powers cannot reopen the same matter on a complaint made to it. The learned Judges said (p. 108):—

“We think it utterly contrary to sound principles that one Magistrate of co-ordinate jurisdiction should, in effect and substance deal with, as if it were an appeal or a matter for revision, a complaint which had already been dismissed by a competent tribunal of co-ordinate authority.”

On the other hand, in *Queen-Empress v. Bapuda* (2), it was held by this Court that there was nothing to prevent a Magistrate after he has once discharged an accused under S. 203 of the Code of Criminal Procedure from enquiring again into the case against him. A discharge not operating as an acquittal leaves the matter at large for all purposes of judicial enquiry. There is jurisdiction still vested in all Magistrates including the one who made the previous enquiry, just as before. But all Magistrates and especially the one who formerly discharged the accused are bound to exercise due discretion to take that discharge into account, and to avoid any such oppressive proceedings as may either expose them to punishment under S. 219 or 220 of the Indian Penal Code or to civil action on the part of the accused.

We do not think, therefore, that the Bench Magistrates at Malvan had no jurisdiction to hear the complainant, and to inquire into the second complaint because a similar complaint had already been dismissed by the First Class Magistrate. But we do think that there was a compelling duty on the complainant to inform the Bench Magistrates that he had

previously filed a similar complaint which had been dismissed, because when the Court to which the second complaint is made becomes aware that a similar complaint has already been dismissed it must necessarily exercise greater care in considering how to deal with the case.

Therefore, we might send back the case to the Bench Magistrates to reconsider their order taking into consideration the fact that a previous complaint was dismissed; but considering the conduct of the complainant we see no reason why we should do so. Accordingly we set aside the order of the Bench Magistrates.

Order set aside.

1925 BOMBAY 259

MACLEOD, C. J. AND COYAJEE, J.

David Sassoon—Applicant.

v.

Emperor—Opposite Party.

Criminal Application for Revision No. 399 of 1924, Decided on 14th January, 1925, against the order of the Presy. Mag. Bombay.

Criminal P. C., S. 488 (1)—Children—Offer to maintain in future is no bar to passing order.

With regard to the maintenance of children, it is sufficient under sub-section (1) of Section 488 if the neglect or refusal to maintain them is proved. On such proof the Magistrate can make an order for the payment of a monthly allowance for the maintenance of each child to such person as the Magistrate from time to time directs. An offer to maintain the children in the future is not sufficient of itself to debar the Magistrate from making the order. The Magistrate will be entitled to consider the circumstances in which the offer was made, and whether it was right and proper that the children, if not in the custody of the father, should be handed over to him.

[P 260 C 2]

G. N. Thakor, I. J. Sopher and S. G. Shertukde—for Applicant.

Daphtary, Dixit, Maneklal and S. S. Patkar—for the Crown.

Macleod, C. J.—The complainant in this case was one Mrs. David Sassoon who presented an application under S. 488, Criminal Procedure Code, for maintenance for herself and her four sons against the respondent David Sassoon, her husband and the father of the children. The defence to the application, as set out in the respondent's statement, was, that the complainant was misbehaving herself with

(1) [1899] 22 All. 108=1899 A.W.N. 211.

(2) [1887] Unrep. Cr. O. 850=Cr.L.J. 40 of 1887.

a certain person, and had gone to Calcutta without his permission. With regard to the maintenance of the four sons, the respondent said that he was willing to have the children with him.

On the facts the Magistrate came to the conclusion without any hesitation that the defence was not proved in any of its material particulars. Consequently the charge of misconduct was proved to be false. The Magistrate further considered that the complainant had satisfied him that the respondent having sufficient means was neglecting to maintain his wife and his four sons, who were unable to maintain themselves. The ages of the children varied from seven to eleven. The Magistrate then considered the contention of the respondent that he was willing to keep the children with himself, and therefore, no order under S. 488 could be made against him. He said:—

"The point is not free from difficulty. It is not covered by any Bombay authority, so far as I know. There are conflicting rulings of the Punjab Court, supporting respondent's contention, on the one hand (*viz.*, P. R. No. 18 of 1894 and P. R. No. 22 of 1917) and the decisions of the Burma Court, supporting the complainant on the other hand (16 Crim. L. J. 656). Considering the object underlying S. 488, Criminal Procedure Code, I prefer to follow Burma rulings rather than Punjab ones. Otherwise in those cases where children are very young, as in this case, a man knowing full well that no mother would part with such children, has simply to make an ostensible offer to keep the children with him and he can thus defeat the object of S. 488, which is to secure provision for helpless children."

The Magistrate then made an order that the respondent should pay in the aggregate Rs. 90 a month to the complainant for the maintenance of herself and the children.

On November 26, a rule was granted on the application of the respondent in order that this question might be decided by this Court. Thereafter an application was made on the Crown side by the respondent under S. 491, Criminal Procedure Code, asking that the custody of the sons should be given to him. The application was heard by Mr. Justice Mirza who came to the conclusion that the petitioner's allegation that for some time past his wife had led an unchaste life and that he was afraid

that if his children were to continue to reside with her they would be contaminated, was absolutely without foundation. The learned Judge was satisfied on the evidence that Mrs. Sassoon had looked after the children very well. She had sent the elder boys to school and had educated them at her own expense. He was also satisfied that the children would be much better looked after by the mother than they would be if they were thrown to the tender mercies of their father.

We can now consider the proper construction of S. 488 of the Criminal Procedure Code in the light of the respondent's contention. We think that with regard to the maintenance of children, it is sufficient under sub-section (1) of S. 488 if the neglect or refusal to maintain them is proved. On such proof the Magistrate can make an order for the payment of a monthly allowance for the maintenance of each child to such person as the Magistrate from time to time directs. An offer to maintain the children in the future is not sufficient of itself to debar the Magistrate from making the order. The Magistrate will be entitled to consider the circumstances in which the offer was made, and whether it was right and proper that the children, if not in the custody of the father, should be handed over to him.

With regard to the maintenance which can be directed to be paid to a wife in case her husband neglects or refuses to maintain her, there is a special proviso to the section that if the husband offers to maintain his wife on condition of her living with him, and she refuses to live with him, the Magistrate may consider any grounds of refusal stated by her, and may make an order under the section notwithstanding such offer, if he is satisfied that there is just ground for so doing. There was a very good reason in our opinion why the legislature did not include children in that proviso, namely, so that the onus should not be thrown on them of stating grounds of refusal which would have to be considered by the Magistrate before making an order for their maintenance. It could not have been intended that the father by stating his willingness to maintain the children could deprive the Magistrate of his jurisdiction to make an order under the section. It seems to us that once the Magistrate is satisfied that a father has neglected or refused to main-

tain his children, he is entitled to make an order for their maintenance, though he may consider any offer by the father to maintain them in the future on its merits. In this case, agreeing entirely with the remarks of the learned Judge who heard the application under S. 491, Criminal Procedure Code, we are satisfied that the children ought to remain with the mother. The rule will, therefore, be discharged.

Coyajee, J.—I agree.

Rule discharged.

1925 BOMBAY 261

MACLEOD, C. J. AND CRUMP, J.

Bhimrao Narasimha Hublikar—Appellant.

v.

Emperor—Opposite Party.

Criminal Appeal No. 408 of 1924, Decided on 12th November, 1924, from conviction and sentence passed by Add. S. J., Sholapur.

(a) *Evidence Act, S. 114 ill (b)*—Corroboration in all material particulars is not necessary.—*Evidence Act, S. 133.*

In dealing with the evidence of an accomplice the Judge is not bound to rely on such statements only as are corroborated by other reliable evidence. Once a foundation is established for a belief that a witness is speaking the truth because he is corroborated by true evidence on material points, the Judge is at liberty to come to a conclusion as to the truth or falsehood of other statements not corroborated. [P. 262, C. 2]

(b) *Penal Code, S. 161*—Favour need not actually be shown.

No favour need be shown to the briber as a fact; it would be sufficient if he was led to believe that the matter would go against him if he did not give the Officer a present. [P. 263, C. 2]

Chimanlal Setalvad, A. G. Desai and V. S. Sanzgiri—for Appellant.

Velinker and S. S. Patkar—for the Crown.

Macleod, C. J.—The accused was charged before the Additional Sessions Judge at Sholapur with having accepted from one Shri Kisan Sarda cloth to the value of Rs. 95-7-6 as a motive for showing favour to the said Sarda in suit No. 570 of 1922 on his file, the accused at that time holding the appointment of joint Subordinate Judge at Sholapur and thus having committed an offence under S. 161 of the Indian Penal Code. The judge disagreeing with the assessors

found him guilty and sentenced him to one year's simple imprisonment and a fine of 1,000.

The accused has appealed.

Sarda, a wealthy merchant of Sholapur owned a house which he had leased to the Municipality to be used as a school building. In April 1922 he was told that if he would open windows on the ground floor and add a second storey he would be paid an increased rent. With the consent of the Municipality he commenced the alterations and additions. His neighbours on either side objected. One of them, Tandulwadikar, filed suit No. 570 of 1922 in the Subordinate Judge's Court on June 1 and obtained next day an *interim* injunction *ex parte*. The notice of the injunction was served on Sarda on June 9. Exhibit 2 B is the Roznama of that suit. Sarda put in a written statement and the suit was adjourned for production of documentary evidence. On the 29th the Judge appointed the following day a Sunday for an inspection of the premises. It may be necessary to mention, though it is not of much importance, that the owner of the premises on the other side of Sarda's building also filed a suit against him, and in July 1922 Sarda himself had three or four suits pending in the Court of the accused. On the 30th, Sarda and his pleader Phadke went in Sarda's carriage to drive the Judge to the premises. After viewing some other premises the Judge came to Sarda's building. Mehendale, the plaintiff's pleader, joined the party at the first premises. Sarda alleges that accused said to him in Canarese 'You have built this unjustly. I shall have it demolished.' In the Magistrate's Court Sarda said that accused told him he would have to buy plaintiff's land. When the inspection was finished the Judge went to Phadke's house for tea. Sarda alleges that after tea the accused said to Phadke in Marathi 'Speak to your client and get him to buy the land.' From Phadke's house the Judge went on with Sarda and Mehendale to the latter's house where he got out. Sarda then deposed as follows: "When we started accused asked me in Marathi whether I knew of a good cloth-shop. I said there were two or three good cloth shops, and mentioned Shingi's Ganeshrām's and Nikte's. He asked me to drive to Shingi's. He then said 'You have built the wall unjustly and I shall have to have it pulled

own., I said 'It is in your hands, do as you wish.' He said 'Nothing comes out of merely lending a carriage. Recognise that fact and I shall have your business done.' I suspected that he was asking for a bribe. He meant that the loan of carriage was not enough. I had been often lending him my carriage." The account given of this conversation by Sarda in the Magistrate's Court was practically to the same effect, though he did not mention that the Judge said "I shall have your business done." Sarda said "Accused said to me 'you have illegally opened windows, I will have to order them to be blocked up.' I said 'It is in your hands, do what you like.'" Accused replied 'Nothing comes of lending a horse and carriage for drives, you think this over.'" As to what happened at Shingi's shop I have very little doubt that the prosecution evidence correctly describes it. Shingi showed some cloth to the accused and he chose various pieces asking Shingi to debit the price to Sarda's account. Shingi looked at Sarda who said "enter it." Samsuddin a servant in the shop, made an entry. Accused had said "do not enter my Gujarat, enter Sarda's Haste." The cloth was then packed up and placed in the carriage. Sarda says that after they had left the shop accused went back again into the shop for two or three minutes but whether he did or did not go back is not very material. The accused was evidently anxious that the cloth should not be debited to himself. Sarda then drove the accused back to his bungalow where he got out with the parcel of cloth.

The defence is briefly as follows.

The accused thought of going to his bungalow before going to Shingi's shop to bring some money. To avoid the delay he asked Sarda to accommodate him for a short time. When they got back to the bungalow accused went in for the money to pay Sarda and found that his wife who had the key of the cash box was out, so he asked Sarda to wait for payment and he sent the money the next day by the hand of his son. Yasin, the driver of Sarda's carriage, deposed that the accused on arrival at his bungalow went straight in with the cloth and witness drove off. There is no evidence whatever that the accused sent the money next day to Sarda. Sarda denies he received the money, no receipt has been produced,

though, when the accused's house at Dharwar was searched, receipts on account of small purchases for household necessities were found. Accused's son was not called to say that he took the money to Sarda. Then there was no reason whatever why the accused should not have asked Shingi to open an account of the cloth purchased. A day or two later the accused did make some small purchases on credit at Shingi's shop. A suit was afterwards filed by Shingi against Sarda to recover the balance of account which was paid after a decree had been passed. The evidence, therefore, is conclusive that the accused went in company with a litigant in his Court to Shingi's shop and accepted a present of cloth which was to be paid for by that litigant, and undoubtedly Sarda consented to be responsible for the payment for the cloth to gain favours with the Judge in his suit. It is hardly necessary for the prosecution to rely on Sarda's account of what took place at the inspection of the premises and while he was driving with the accused to the shop. There is ample corroboration of the rest of Sarda's evidence. But I gather from certain remarks in the judgment that the Sessions Judge has fallen into the error of thinking that when weighing the value of the evidence of an accomplice it requires corroboration not only in material particulars but in all material particulars. Although the Judge thought that Sarda came through the ordeal of a severe cross examination very creditably, he could not accept Sarda's evidence of what the accused said on the two above-mentioned occasions because there was no corroboration, which, as I understand the judgment, meant that there was no other evidence with regard to those conversations, and, therefore, the Judge did not feel himself entitled even to consider whether that evidence is true. I may be wrong in my surmise, but at any rate I think this is an occasion for pointing out that in dealing with the evidence of an accomplice the Judge is not bound to rely on such statements only as are corroborated by other reliable evidence. Once a foundation is established for a belief that such a witness is speaking the truth because he is corroborated by true evidence on material points, the Judge is at liberty to come to a conclusion as to the truth or falsehood of other statements not corroborated. Adopting

this test I think there are good reasons for thinking that Sarda's evidence regarding the two conversations with accused are substantially correct. That the accused said something to Sarda at the inspection of the premises is deposed to by Mehendale, the plaintiff's pleader, and judging by what admittedly happened afterwards it is not improbable that the accused said something to Sarda to induce him to think his position in the suit was rather doubtful. At any rate a suggestion was made thereafter by the Court that Sarda should buy the plaintiff's land and a Panch was appointed to fix the value. I don't however, attach very much importance to this incident as the accused might merely have been advising Sarda that in order to get rid of the plaintiff's claim to obstruct his building it would be cheaper to buy his land. The alleged conversation in the carriage was more direct and I have come to the conclusion that the accused must have said something to Sarda which resulted on their arrival at the shop in Sarda at once consenting to have the cloth purchased by the accused debited to his account.

As would only be natural the prosecution case was most strenuously resisted before the Sessions Judge and I shall now deal with the various points raised before the Sessions Judge and by appellant's counsel before us.

It was seriously contended before the Sessions Judge that there was a conspiracy amongst the members of the Sholapur Bar with whom the accused was undoubtedly unpopular owing to his demeanour towards them in Court, and his inveterate desire to get cases settled, to get the accused into trouble. It is regrettable that such an accusation should have been made by an advocate of this Court who contended that this was a bar prosecution and that the exertions of the C. I. D. were supported by Mehendale and other pleaders. The Sessions Judge has dealt with this allegation quite correctly. When Mehendale headed the deputation of pleaders to the District Judge in August 1923 he stated that he had heard of the purchase of cloth. That purchase was an undisputed fact about which Mehendale was entitled to give information to the District Judge. Thereafter neither Mehendale nor any other pleader did anything except to give evidence as they were bound to do, and there is nothing in

the evidence of Mehendale or Phadke which shows any signs on their part of giving false evidence with the malicious intent of assisting the prosecution. It was also contended that no favour was shown to Sarda in his suit. But that is not necessary. It would be sufficient if Sarda was led to believe that the case would go against him if he did not give the Judge a present and the evidence tends to show that this is what happened. It was useless for counsel to urge that the prosecution case was absurd, that there was nothing left of it when the record was closed, that it rested entirely on Sarda's evidence and that the Court was bound to accept the explanation of the accused that he had paid for the cloth. Very little endeavour was made to explain why the accused should have asked Sarda to give him credit instead of asking Shingi to open an account. It was suggested that was an usual occurrence between friends, but if a man goes with a friend to a shop where he can get credit he does not usually ask his friend to be responsible for goods purchased. Then it was obviously necessary to blacken Sarda's character in every possible way. But granting that he was a wealthy young voluptuary, who had been tried for murder and acquitted, that was no reason why he should persist in saying that the accused had never paid him for the cloth. He certainly was not anxious to give information to the police, but the shortest way out of his trouble would have been to say that he had been paid on the following day. We are asked to believe that although he knew all the time that he had been paid, he persisted in his denial at the instigation of the Police in order to carry favour with them. The appeal was argued before us in a more temperate and serious manner, but on a full consideration of the record, and of the arguments addressed to us by Sir Chimanlal I can come to no other conclusion than that the conviction was right. I would dismiss the appeal and confirm the conviction and sentence.

Crump, J.—The appellant in this case was, on July 30, 1922, a Second Class Subordinate Judge on a salary of Rs. 510 per mensem. He had served for over seventeen years as a Judge and held the appointment of Joint Subordinate Judge at Sholapur. The charge on which he has been convicted was that on the date in

question he accepted from Shrikissan Laxminarayan Sarda certain cloth valued at Rs. 95-7-6 as a motive for showing favour in the discharge of his functions as a Judge to the said Shrikissan Laxminarayan Sarda.

I have carefully considered the arguments urged before us, and I have examined the record of the case and the conclusion to which I have come is that the case is in its nature extremely simple. When the salient facts are grasped it is at once apparent that there is no room for any elaborate discussion. It may be premised that there is, in my opinion, no ground for the suggestion that there has been any conspiracy against the appellant. Nor is the history of the events subsequent to July 30, 1922, such as to give rise to any cogent argument for or against the appellant. In order to appreciate the events of that crucial date a few introductory facts are necessary.

The person who is said to have given the gratification, whom for brevity I shall call Sarda, is a well-to-do Marwadi of Sholapur. There is nothing in the man's antecedents which seriously detracts from the value of his testimony. On the other hand, he is not a man in whom implicit confidence can be reposed. Some time in May 1922 he made certain additions to a house which was leased to the Municipality as a school, and on June 1, 1922, one of his neighbours named Tandulwadikar filed a suit against him (Suit No. 570 of 1922) in the appellant's Court. Tandulwadikar in that suit prayed that a portion of the new building should be demolished. I have examined the record of that suit and I find nothing in it to indicate any conduct of the appellant inconsistent with the conduct of an honest Judge. The charge against the appellant rests upon oral evidence.

Only July 30, 1922, the appellant decided to examine the premises. On the afternoon of that day he drove to the place in Sarda's carriage. The defendant Sarda's pleader Mr. Mehendale and the plaintiff Tandulwadikar's pleader Mr. Phadke were present, as also the parties themselves. After the inspection, the appellant, the two pleaders, the appellant's Shirestedar Joshi and the defendant Sarda drove to Phadke's house and had tea. From that house, the appellant, Mehendale and Sarda drove as far as Mehendale's house where Mehendale left

them. From that house the appellant and Sarda drove to the shop of Gopinath Shingi, a cloth merchant. At that shop in the presence of Gopinath and his clerk Shamsuddin the appellant selected the cloth in question. The purchase was entered in Sarda's name. Thence the appellant and Sarda drove to the appellant's house. The appellant took the cloth into his house and Sarda drove away in his carriage.

The facts set out above are admitted. The controversy turns upon three points: (a) what took place at the inspection, (b) what took place at the shop, and (c) what took place in the carriage. As to the first point there are five witnesses, viz., the pleaders, Tandulwadikar, Sarda, and the clerk Joshi. As to the second point there are three witnesses, viz., Sarda, Shingi and Shamsuddin. Sarda alone speaks of the incident in the carriage.

Before dealing with the oral evidence it is necessary to consider the admitted facts. I should be very willing to place an innocent construction on those facts but I find myself unable to do so. The appellant is an experienced judicial officer. He goes to inspect premises in a suit where very valuable interests of the defendants are at stake. From that inspection he goes almost directly with the defendant to a cloth merchant and permits the defendant to purchase on his behalf cloth of a not inconsiderable value. That cloth he takes away to his house. Such conduct in a Judge is extraordinary. Two explanations are possible and two only: (1) indiscretion, (2) dishonesty.

I find it hard to believe that an experienced Judge would be so indiscreet. He must have known that Shingi would have given him credit. Indeed he admits that he obtained goods on credit from Shingi two days later (August 1). The explanation that he allowed Sarda to purchase the goods because he had no money with him is difficult to accept. It is hard to believe that he did not know that Shingi would have given him the goods on credit. That a merchant in Sholapur would in fact have readily given credit to a Subordinate Judge is so probable in the light of ordinary human experience that there could be little doubt on the point even if Shingi had not so stated in his evidence. The appellant alleges that he paid Sarda next day. No attempt has been made to prove this. Ordinarily there would have

been a receipt. No receipt is produced. The conclusion (I reach it with reluctance) is that the admitted facts point to the second alternative, that is, dishonesty.

It will be convenient here to deal with the question as to how far it is safe to rely upon Sarda. He is an accomplice. I accept the test laid down by Batchelor, J. in *Emperor v. Govind Balvant Laghate* (1): "In so far as (the witness) is an accomplice the law, as laid down in Ss. 133 and 114, ill. (b), of the Indian Evidence Act, declares that while the Courts should ordinarily make a presumption against the credit of an accomplice that presumption may be displaced by other circumstances, notably by sufficient corroboration of the accomplice on material points...It seems to me that when all legal precautions have been taken and all relevant considerations duly weighed, there remains the plain question whether the Judge or Magistrate does or does not believe the particular accomplice." The question then which I put to myself is this: "Bearing in mind the caution necessary in dealing with the evidence of the witness do I believe Sarda's evidence?" In the light of the admitted facts I should find it difficult to answer that question in the negative. In other words the admitted facts themselves furnish material corroboration. It is, however, unnecessary to rest the decision on that view for there is other evidence which furnishes a more secure ground for a conclusion.

First, I will deal with what took place at the inspection. The witness Joshi is colourless and his evidence may be discarded. Tandulwadikar says that the appellant told him to compromise the matter by selling the land to Sarda. Mehendale's evidence contains little that can be said to go against the appellant so far as this part of the case is concerned. There is, however, one statement of his which has given rise to some controversy, viz., that the appellant spoke to Sarda in Canarese. The significance of this lies in the fact that Sarda says appellant said to him in Canarese "you have built this unjustly. I shall have it demolished." Phadke says that appellant said in English that the house had been newly built and if the wall was joint it would have to be pulled down. As to the words used the discrepancy is immaterial considering the time

that has elapsed. As to the language used Mehendale does not know Canarese while Phadke does. Assuming that the witnesses are honest, Mehendale would be more likely to recollect the use of an unknown language. But little turns on this. Even if it be supposed that the appellant expressed an opinion adverse to Sarda, it would be unfair to lay much stress on that. No doubt, it would have been more judicial not to hazard any opinion. But the remark might have been innocent enough, though indiscreet. I do not think, therefore, that much arises from this incident. Nor can I see that the *bona fides* of any of those witnesses can fairly be questioned or that any conclusion adverse to any of them on any such ground would assist the determination of the case.

The second incident at the shop is more serious. Shingi's evidence is as follows:—

"Accused chose some cloth and asked the price. Shamsuddin made out a rough memo before he made up the parcel. Then accused said 'Do not enter it in my name. Enter it in the name of Sarda.' I asked, 'Is that all right?' He said, 'All right enter it.' So I told Shamsuddin to enter the goods. When accused was leaving the shop he said, 'Do not enter the goods in my name. Do not enter my 'Gujarat'."

Shamsuddin's story is substantially to the same effect. I can find no sufficient reason for suspecting this evidence. I do not think that Shingi would give false evidence merely because the appellant as a Judge decided another suit against him. If this evidence is true, as it appears to be, then read with the admitted facts, which I have already summarised, it is most difficult to believe that the transaction was innocent.

The third incident rests, as I have said, on Sarda's evidence alone. His story is that, while he and the appellant were alone in the carriage, the appellant said to him, "You have built the wall unjustly and I shall have it pulled down." The witness replied, "It is in your hands, do as you wish". The appellant said, "Nothing comes out of merely lending a carriage. Recognise that fact and I shall have your business done."

I return to the test which I have laid down as to the evidence of an accomplice. Sarda is corroborated most materially by the admitted facts. He is corroborated

(1) [1916] 18 Bom. L. R. 266=34 I. C. 976=17 Cr. L. J. 256.

also by Shamsuddin and Gopinath in particulars no less material. Is there any reason for rejecting his evidence on this point where he stands uncorroborated? That question can only be answered by asking another question. "Do I believe Sarda on this point?" The learned Sessions Judge has, in portions of his judgment, used language which suggests that he regarded corroboration as essential on each and every particular to which the witness Sarda deposes. I doubt if he really meant to go to that length. Of course no rule of that kind can be laid down. Indeed no general rule is possible. Each case depends upon its own facts. In this case, after giving full weight to all the facts and circumstances, my conclusion is that Sarda on this point has told the truth. The significance of this conversation is too plain to need comment.

I have not omitted to consider the argument that the transaction was too open to be dishonest. Many answers are possible. The point is sufficiently dealt with in para 36 of the judgment of the learned Sessions Judge. Nor is there much force in the argument that the subsequent history of the suit does not show that any special favour was shown by the appellant to Sarda. Such considerations as these are of little value in the face of the positive evidence in the case.

That the whole story, if believed, discloses an offence punishable under S. 161 of the Indian Penal Code needs no demonstration. I am of opinion, therefore, that the conviction is correct and should be upheld. The sentence is not unduly severe. I would confirm the conviction and sentence and dismiss the appeal.

Appeal rejected.

1925 BOMBAY 266

MACLEOD, C. J. AND CRUMP, J.

Basappa Rudrappa Dhamangi—Appellant.

v.

Emperor—Opposite Party.

Criminal Appeals Nos. 435 to 437 of 1924, Decided on 24th November, 1924, from Convictions and Sentences by Ag. S. J., Belgaum.

Criminal P. C., S. 288—"Provisions" are not limited to Ss. 155 and 157, of Evidence Act.

Under S. 288 the evidence of a witness taken before the committing Magistrate can in the discretion of the Judge, be treated as substantive

evidence in the case "for all purposes subject to the provisions of the Indian Evidence Act." "Provisions" in the section cannot be limited to particular provisions in the Evidence Act, so that statements made by witnesses before the committing Magistrate are admissible not only to contradict or corroborate a witness but also for the purpose of determining the guilt or innocence of the accused. But if the witness changes the version before the Sessions Judge such evidence must be accepted with more caution, than the evidence of a witness who adheres in the Sessions Court to what he deposed before the committing Magistrate.

[P. 257, C. 2, P. 268, C. 1]

K. H. Kelkar—for Accused.

S. S. Patkar—for the Crown.

Macleod, C. J.—The three accused were charged before the Acting Sessions Judge of Belgaum with having committed the murder of one Sakreva on the night of April 6, the third accused being charged in the alternative under Ss. 302 and 109 of the Indian Penal Code with abetment of the murder. Accused Nos. 1 and 2 were found guilty under S. 302 and accused No. 3 was found guilty of abetment under Ss. 302 and 109 by the Sessions Judge disagreeing with the assessors. All were sentenced to transportation for life. The case for the prosecution was as follows. Sakreva was a Jogti woman living alone. Close by lived Monappa a carpenter and his wife accused No. 3. Monappa became too intimate with Sakreva with the result that accused No. 3 finding her remonstrances of no avail instigated accused Nos. 1 and 2 to murder Sakreva.

Sakreva was last seen alive on the evening of April 6. On the evening of the 8th her dead body was discovered in a tank a short distance away from her hut. It was stripped of clothes and tied by a rope and weighed down by two stones. When her hut was searched a quilt upon a charpoy and two baskets were found stained with blood. Apart from the evidence of Tangeva, wife of accused No. 1, which I shall deal with hereafter, two witnesses implicate accused Nos 1 and 2.

Shivlinga Kempanna (Exh. 6) stated that on the evening of the 6th he saw accused No. 1 at the door of his hut and accused No. 2 at the door of the hut of the deceased. He asked them what they were doing and accused No. 1 said that Sakreva was ill and as he could not assist on account of his caste accused No. 2 who was a Lingayet was giving her milk and rice. Shivhasappa (Exh. 7) was watching his field that night. He heard a noise and called out when accused Nos. 1 and 2

answered him. They each took a stone and went away. The Judge considered there was no reason why these witnesses should not be believed. Ganappa Basappa (Exh. 12) was called by the Patel on the morning of the 9th to a Panchnama over the dead body. The next day he attended at the hut of the deceased when a quilt and two baskets stained with blood were attached. Accused No. 2 then took the Panch to the field of the Police Patel and pointed out the place where there were marks of two stones having been removed. He took them to the tank, went into the water, and brought out a Sari which had been hidden in the silt. That Sari was identified as belonging to the deceased. Exhibit 8, the Patil said that he compared the marks where two stones had been removed with the stones found tied to the body and they tallied. Accused No. 2 also produced Rs. 14 which he said he had collected for building a house. The prosecution suggests that the money was given by accused No. 3 as a reward for committing the murder.

I now come to the evidence of Tangeva.

Before the committing Magistrate she said that Mallava had instigated accused Nos. 1 and 2 to murder Sakreva on account of her intimacy with Monappa. Accused No. 3 was represented by a pleader who declined to cross-examine Tangeva. The Magistrate, however examined her further on her statement at considerable length. Before the Sessions Judge she denied everything she had stated before the Magistrate. She admitted that Mallava and Sakreva used to quarrel but when she was asked what was the reason for the quarrel she said she left the village on the Sunday morning and did not return until after the dead body had been found. Later on she said there was a rumour that accused No. 3's husband was in criminal intimacy with the deceased but she did not know why Mallava quarrelled with Sakreva. She (Sakreva) was in the keep of accused No. 3's husband for two years. Questioned on her previous statement she said that although no one had threatened her, and both the Fouzdar and the Magistrate merely asked her to tell the truth she told lies through fear.

The question whether Tangeva's statement before the Magistrate could be admitted as substantive evidence in the case under the provisions of S. 288 of the Criminal Procedure Code has been argued

at considerable length both before the Sessions Judge and before us. When the Code was amended the words "subject to the provisions of the Indian Evidence Act" were added to S. 288.

Mr. Kelkar contends that the only provisions of the Indian Evidence Act to which this amendment referred were Ss. 155 and 157 which enact that previous statement can be proved to contradict or corroborate a witness. If this argument were to hold good, S. 288 would be rendered superfluous, since a statement made before the committing Magistrate could already be used for limited purposes under the Indian Evidence Act. The Government Pleader asked the Sessions Judge to refer to the proceedings of the Legislative Council or at least to the statement of the objects and reasons of the amendment as contained in those proceedings, but I think the Sessions Judge was clearly right in holding that such a reference was not permissible. It is difficult to see how the word "provisions" in S. 288 as amended can be limited to particular provisions in the Indian Evidence Act. We are asked to accept the proposition without a single argument being brought forward to support it, and the simple answer is that the amendment merely makes clear what might possibly have been uncertain without it, that the Judge must scrutinise the statement in the same way as any other evidence which is tendered, he must strike out what on one ground or another is inadmissible according to the law of evidence, and consider whether that part which is admissible can be believed or not, always having regard to the fact that the witness before him has contradicted it. I am of opinion that the Judge in this case has exercised all proper precautions before deciding that he could believe the statement of Tangeva recorded by the Magistrate. He says: "I do not think the statement the whole truth. It is clearly influenced by the desire of the woman to shield her husband, but it appears to be inconceivable that the whole should be a fabrication." It must be remembered that Tangeva did not suggest that she had been in any way intimidated by the Fouzdar or the Magistrate before she made her statement, and the Judge remarks at the close of her evidence: "The woman seems to have her wits very much about her and I should say it is certainly unlikely she would be intimi-

dated by the Mamlatdar or the Fouzdar." I think the conviction of all accused was correct and that the appeals should be dismissed.

Crump, J.—It cannot, I think, be doubted that the learned Sessions Judge has correctly appreciated the meaning and scope of S. 288 of the Code of Criminal Procedure. Under the section as it stood before the recent amendment it was well settled that the evidence of a witness taken before the committing Magistrate could, in the discretion of the Judge, be treated as substantive evidence in the case. The recent amendment adds to the section the words "for all purposes subject to the provisions of the Indian Evidence Act." There does not appear to be any possible obscurity as to the meaning. The evidence is evidence "for all purposes" and is therefore evidence for the purpose of determining the guilt or innocence of the accused. But had the section ended there, it would have been possible to argue that such evidence is exempt from any of those provisions of the Indian Evidence Act which would otherwise render it inadmissible. The legislature, therefore, deemed it necessary to safeguard the use of that evidence by declaring expressly that like any other evidence it was "subject to the provisions of the Indian Evidence Act." Among those provisions are many which exclude or limit the use of evidence. The record of the statement of a witness might, for instance, incorporate the statement of another person not called before the Court or might disclose the fact that the accused person had been previously convicted, or had made a confession to a police officer. Without the limiting words there would be no direct provisions excluding those matters. That is the true intention of the added words. The Sessions Judge was, therefore, justified in his discretion in using the statement of Tangeva as evidence in the case. It is not, in my opinion, either necessary or expedient to attempt to lay down any general rule as to the effect to be given to such evidence beyond saying what is indeed obvious, that such evidence must, in the nature of things, be accepted with more caution, than the evidence of a witness who adheres in the Sessions Court to what he deposed before the committing Magistrate.

In this case the conviction of accused Nos. 1 and 2 rests not on Tangeva's state-

ment alone but on other evidence also. There can be no doubt that Sakreva was murdered, and it is highly probable that she was murdered in her hut on the night of April 6. The two accused were seen at or about that hut by Shivlinga on the night in question, and accused No. 1 gave an explanation of their presence which, in the light of undoubted fact that the woman was murdered, appears to be false. The next night Shivbasappa saw them remove from a field two stones, and after the corpse was found in the tank the stones, which had been used to weigh it down were compared with the marks at the place shown by Shivbasappa and were found to tally. Accused No. 2 further pointed out the Sari of the deceased which was buried in the mud of the tank. If this evidence be considered in the light of Tangeva's first story there is no reasonable doubt of the guilt of accused Nos. 1 and 2.

As regards accused No. 3 there is evidence which seems credible that the deceased was in the keeping of her husband, and that this intrigue had caused bitter quarrels, and even violence between the two women. Sakreva's circumstances were such as to exclude any other conceivable motive for the crime. In the circumstances I feel no doubt that Tangeva's earlier story was true, and that accused No. 3 was a party to the crime. Had Tangeva given any rational explanation of her first evidence the matter might have been more doubtful but it is plain that before the Sessions Court she was not telling the truth. This being so I see no reason to refuse to believe her earlier story.

I would confirm the convictions and sentences and dismiss the appeals.

Appeals rejected

1925 BOMBAY 268

MACLEOD, C. J., AND CRUMP, J.

Mangal Naran—Accused—Appellant.

v.

Emperor—Opposite Party.

Criminal Appeal No. 439 of 1924, Decided on 17th December 1924, from conviction and sentence passed by Addl. S. J., Ahmedabad.

Criminal P. C., S. 439—Appeal pending—Notice for enhancing sentence should not be issued till dismissal of appeal.

When a case comes to the knowledge of the Court by an appeal having been filed against a conviction it is not desirable, if the appeal is admitted, to issue a notice at the same time under S. 439 to enhance the sentence. The notice should issue after the appeal has been dismissed after being dealt with on its merits. [P 269 C 2]

S. S. Patkar—for the Crown.

No appearance for the accused.

Macleod, C. J.—The accused in this case was found guilty of (1) kidnapping a girl in order to commit murder under S. 364, Indian Penal Code, and (2) having murdered the girl and so having committed an offence under S. 302, Indian Penal Code. For the first offence he was sentenced to three years' rigorous imprisonment, and for the second he was sentenced to transportation for life. The accused filed a petition of appeal from the jail and when it came before the Court for admission the Court was of opinion that the accused ought to have been sentenced to death. Consequently the following order was made:—"Admit and issue notice to enhance the sentence, i.e., to sentence of death."

This order would at first sight seem to be strange, although it may be justified by the addition to S. 439 of the Criminal Procedure Code contained in sub-S. 6. The Court exercising the powers conferred on a Court of appeal by the relative section of the Code of Criminal Procedure has no power to enhance the sentence. But under S. 439:—

"In the case of any proceeding the record of which has been called for by itself, or which has been reported for orders, or which otherwise comes to its knowledge, the High Court may, in its discretion, enhance the sentence."

Then under sub-S. 6:—

"Notwithstanding anything contained in this section, any convicted person to whom an opportunity has been given under sub-S. (2) of showing cause why his sentence should not be enhanced shall, in showing cause, be entitled also to show cause against his conviction."

The previous practice has been to dispose of the appeal first before considering the question whether the sentence should be enhanced in the event of the appeal being dismissed. Generally the cases in which the powers of the Court to enhance the sentence under S. 439 have been exer-

cised are those in which the record has been called for by the High Court, or which have been reported to the High Court, or which otherwise come to the knowledge of the High Court on a perusal of the returns from the Subordinate Courts, and in such cases the High Court may, if it thinks fit, issue notice to the accused under S. 439, Criminal Procedure Code, to show cause why the sentence should not be enhanced. Then it is in accordance with justice that the accused should be entitled to show cause, not only against the sentence being enhanced but also against the conviction. But when a case comes to the knowledge of the Court by an appeal having been filed against a conviction it is not desirable, in my opinion, if the appeal is admitted, to issue a notice at the same time under S. 439. It seems to me absolutely incongruous that the Court in the same breath should admit the appeal of the accused, and issue notice calling upon him to show cause why the sentence should not be enhanced, and especially it seems incongruous in a case of this kind, where the sentence proposed to be inflicted in the notice to enhance is the sentence of death. If, after an appeal has been heard on its merits and dismissed, a notice to enhance the sentence is issued, the accused has still the right to show cause against his conviction, but any attempt to set aside the conviction would not have much chance of success. However that may be, speaking for myself, I prefer to retain the old practice, namely, first to deal with the appeal, and then to consider whether a notice to enhance should issue. In this case there can be no doubt that the accused was guilty of murder, so the appeal is dismissed.

We have now to consider whether we should proceed with the notice to enhance. If we decide to proceed we should have to send for the accused to be present in Court. Now it is only in very rare cases that we interfere with the order of a Sessions Judge sentencing a man convicted of murder to transportation for life, because the circumstances of the case appeared to him not to demand the sentence of death. I can only remember myself one case in which the sentence of transportation for life was enhanced to sentence of death by the High Court. The facts proved in that case were so shocking that it appeared to the Court that the sentence of death was the only sentence that

could be imposed on the accused. There are many murder cases which come on appeal to this Court in which it has been evident that the Sessions Judges were too lenient, and had exercised the discretion which they are given by law too much in favour of the accused. But, as I have already stated, we do not like to interfere except when we think that the sentence of death is the only possible sentence to be inflicted. In this case, although we think that the Sessions Judge ought to have sentenced the accused to death, we are not disposed to proceed with the notice to enhance the sentence.

Crump, J.—I agree in this case that the Sessions Judge would have exercised a wider discretion had he sentenced this accused person to the extreme penalty for the case was extremely bad of its kind. At the same time I do not think that it is of such an exceptional nature that we should exercise the powers that we possess to enhance the sentence of transportation for life to a sentence of death. I should be most unwilling to do so in any but most exceptional cases. I also agree as to the practice in such matters. To make the admission of the appeal of an accused person the occasion for calling upon him to show cause why his sentence should not be enhanced is, in my opinion, undesirable. It is likely to produce an impression on the mind of an illiterate accused in jail that it is proposed to enhance the sentence because he has appealed. Further, my own experience is that this practice is likely to lead to an inconvenient result because it confounds two matters which should be kept separate. The first point on an appeal is to consider whether the conviction is right or not, and that is one matter. When that matter has been disposed of, the further question that arises is as to whether the sentence imposed is not inadequate. But that is entirely a separate question, which, speaking for myself, I prefer to keep distinct. Although I do not say that the procedure followed in the present case is in any way contrary to law, I do say that it is not a desirable practice. I agree, therefore, with the remarks of the learned Chief Justice.

Appeal dismissed.

★ 1925 BOMBAY 270

SHAH, AG. C. J. AND KINCAID, J.
Darubhai Mithabhai—Appellant.

v.

Bechar Desai—Respondent.

Second Appeal No. 282 of 1922, Decided on 16th September, 1924, from the decision of the Dt. J., Broach, in Appeal No. 17 of 1919.

★ *Limitation Act, Art. 182(2)*—*Instalments decree—Instalments become payable after date of appellate decree—Dekhan Agriculturists' Relief Act S. 15 B.*

The time fixed for the payment of the instalments under an instalment decree which is confirmed by the appellate Court should be allowed from the date of the confirmation of the decree. Limitation for an application under S. 15 B of the D. A. R. Act with reference to each instalment should be counted from the date when it is payable under the above calculation. [P 271 C 2]

R. J. Thakor—for Appellant.

P. B. Shingne, for *M. K. Thakor*—for Respondent.

Judgment.—The decree under execution as passed by the trial Court on September 27, 1911, is in these terms:—

"That the plaintiff should pay to the defendant No. 2 Rs. 299 and costs of this suit together with interest thereon at the rate of six per cent by three equal annual instalments from this day. He should pay the first instalment on March 15, 1912, and he should pay every subsequent instalment on the same date of every year. And until the whole debt is paid off as shown above, the charge of defendant No. 2 will permanently remain on the plaint property. If the plaintiff fails to pay any of the instalments whatever, the defendant No. 2 is at liberty to make an application to the Court under S. 15 B, cl. 2, of the Dekkhan Agriculturists' Relief Act."

This decree was subsequently confirmed by the District Court, and ultimately by the High Court on October 16, 1914. The appealing party was the mortgagee, the original defendant No. 2, that is, the present appellant. After the decree was confirmed by the High Court on October 16, 1914, he presented the application for execution of the decree on July 2, 1918 and according to the statement in the Darkhast, two payments, one of Rs. 150 and the other of Rs. 50, were made on May 15, 1916, and July 18, 1916, respectively, by the plaintiff to the mort-

gagee. Execution was sought in respect of the balance of the three instalments payable under the decree as provided by the decree by an order for sale under S. 15B of the Dekkhan Agriculturists' Relief Act. Both the lower Courts have disallowed the application for execution on the ground of limitation.

According to the terms of the decree as passed by the trial Court, the instalments become payable on March 15, 1912, in 1913 and 1914 respectively and in fact all the instalments had become payable before the decree was finally confirmed in 1914. The lower Courts have taken the view that as the application had not been made within three years from the date of confirmation of the decree it was time-barred. It was not suggested in the lower Courts, and it is not suggested before us, that the two subsequent payments could affect the question of limitation in any way. The whole question is whether the application is within time under Article 182, cl. 2, of the Indian Limitation Act. According to the third column of the schedule of Article 182 time begins to run (where there has been an appeal) from the date of the final decree or order of the appellate Court. Time, therefore, under that clause, commenced to run from October 14, 1914, for the purpose of limitation.

On behalf of the appellant before us it is urged that the three instalments which were payable under the decree of the first Court became payable really in virtue of the confirmation of the decree, in March 1915, 1916 and 1917 respectively, and that according to that view of the matter this application would be within time as regards the second and third instalments. On the other hand, on behalf of the respondent, original plaintiff it is urged that though the time for execution begins to run from the date when the decree was confirmed, it does not follow that the instalments payable under the decree which was confirmed really became payable in virtue of the confirmation of the decree as from the date of that confirmation. There is no case exactly like the present case, where the mortgage amount made payable in instalments under the decree has been held to be payable in similar instalments from the date of the confirmation of the decree. The decision in *Satwaji Balajirav v. Sakharlal Atmaram-*

shet (1) clearly supports the view that the time fixed for payment of the amount of the mortgage-debt under a decree appealed from may be allowed from the date of the confirmation of the decree. If the principle which has been accepted in this decision is applied to the present instalment decree under S. 15 B of the Dekkhan Agriculturists' Relief Act there is no reason why the contention of the appellant should not be accepted. After all, in the result it works in favour of the mortgagor because he gets so much more time for payment of the instalments. No doubt in this case it involves the result that the plea of limitation which might otherwise be open to him would not be open to him. But that by itself is not a sufficient ground for not applying the principle of the decision in *Satwaji's* case. The question is not wholly free from difficulty; and it is really a question of determining the effect of confirmation of a decree for sale of the mortgaged property under S. 15B which directs payments by instalments on certain dates. It is always possible for the parties to have the point made clear one way or the other at the time of confirmation. But on the facts of this case we think that the effect of confirmation is to extend the time. According to that view the instalments became payable every year on the fixed date from the date of confirmation. The application for sale in respect of the last two instalments would be in time. Certain payments are admitted in the Darkhast, and in fact the amount claimed is less than the amount which would be payable in respect of the last two instalments. We allow this appeal and send back the application for execution to the Court of first instance in order that execution may be proceeded with.

Appellant to get his costs throughout in execution up to date. Further costs in the application will be dealt with by the Court proceeding with the execution.

Appeal allowed.

(1) [1914] 39 Bom. 175=26 I. C. 754=16 Bom. L. R. 718.

1925 BOMBAY 272 (1)

MACLEOD, C. J. AND CRUMP, J.

Ambubai Hanmantrao — Defendant—Appellant.

v.

Shankarsa Nagosa—Plaintiff—Respondent.

Second Appeal No. 658 of 1924, Decided on 13th October, 1924, from the decision of the Dt. J., Dharwar.

Civil P. C., O. 23, R. 1 — Second suit dismissed for non-compliance with condition on which permission was granted—Third suit is barred.

The plaintiff was allowed to withdraw his suit with permission to bring a fresh suit on condition that he paid the defendant's costs. The plaintiff filed the second suit but instead of paying the defendant's costs before filing the second suit he paid the same, afterwards.

Held, that on dismissal of the second suit on the ground of his not having complied with the condition on which the permission to bring it had been granted, the plaintiff was not entitled to bring a third suit. [P. 272, C. 2]

Y. N. Nadkarni—for Appellant.

H. B. Gumaste—for Respondent.

Macleod, C. J.—The plaintiff filed Suit No. 143 of 1917 in the Subordinate Judge's Court of Hubli on a certain cause of action. He withdrew that suit with permission of the Court under O. 23, R. 1, alleging that on account of the mis-reading of one of the issues framed by the Court he was not ready with his evidence on the day fixed for trial of the case. The Court made the following order:—

"On condition that plaintiff pays defendants' costs and bears his own costs and pays defendants' costs before filing a fresh suit, he is under the circumstances mentioned in this application, permitted to withdraw with permission to file a fresh suit."

Therefore the condition precedent to his being allowed to file a fresh suit was that he should pay defendants' costs. However, without paying the defendants' costs, he filed fresh Suit No. 92 of 1919. He paid the costs three days before the day fixed for the hearing of the evidence in the case. The Court dismissed the suit on the ground that the suit being filed without previous costs having been paid was bad *ab initio*. This order was confirmed in appeal. The plaintiff, however, considering that the permission given to him by the Court in Suit No. 143 of 1917 was still surviving in spite of the second suit being

dismissed, filed this third suit on the same cause of action.

It was argued that the dismissal of the previous suit amounted to *res judicata*, and if that argument did not succeed, it amounted to a withdrawal without permission under para 1 of O. 23, R. 1, Civil Procedure Code. Both these arguments failed to convince the Subordinate Judge who held that the present suit was maintainable, and dealing with the further issues, passed a decree in favour of the plaintiff for possession.

In appeal the decree was confirmed.

We think that both these decisions were wrong on this very simple ground that the permission granted by the Court in the original suit would only extend to the filing of one fresh suit, and not to the filing of any number of fresh suits, which might be dismissed each in its turn, without any trial on the actual merits of the case between the parties, for failure to pay the costs of the first suit. When the plaintiff had refused to comply with the condition on which alone he could file a second suit, he could not avail himself of the original permission of the Court for filing a third suit. That permission no longer remained in force. If we were to accede to the argument of respondent No. 1 and uphold the decision of the lower Courts, we would be illegally extending the provisions of O. 23, R. 1, in favour of the plaintiff, who would thus be allowed to harass the defendants with a succession of suits. The appeal must be allowed and the suit must be dismissed with costs throughout.

Appeal accepted.

1925 BOMBAY 272 (2)

MACLEOD, C. J. AND CRUMP, J.

Bansidhar Durgadatt — Defendant — Appellant.

v.

The Tata Power Company Ltd.—Plaintiffs—Respondents.

O. C. J. Appeal No. 95 of 1923 and Suit No. 1821 of 1922, Decided on 9th December, 1924.

Company — Shares applied for on misreading of prospectus—Applicant cannot resist—"Friends of directors" include business friends.

The plaintiff company issued a prospectus. It contained two representations (1) That applications for shares would be received only upto a

certain date; (2) that a certain number of the shares were to be taken up by the directors, agents and their friends. The defendant applied for and was allotted certain shares. The plaintiff company accepted applications, long after the date fixed. The directors, and their agents and friends took up a smaller number of shares than it was alleged that they would take up. The defendant admitted that the fact that the latest date for applications for shares was fixed in the prospectus had not induced him to apply for shares. But he contended that he had understood from the first that the directors, etc., had taken up the shares that it had been announced they would take up.

Held: that the defendant had applied for shares on a misreading of the prospectus and not on the faith of the representations which had been made and that he was not entitled to resile from the contract.

Held: further that the term 'friends' in the prospectus included business as well as social friends, and that it would not be misrepresentation if the promoters guaranteed that so many shares were to be taken up by their friends, when they knew perfectly well that those friends intended to make what they could of the favour shown to them by the reservation, by distributing the shares among their own friends.

Munshi and Coltman—for Appellants.

B. J. Desai, Kanga and Chimn Lal Setalvad—for Respondent.

Macleod, C. J.—The plaintiff company filed this suit alleging that one Bansidar Durgadutt (hereinafter called the first defendant) had by two several applications, dated respectively October 3, 1919, and October 11, 1919, applied for 380 ordinary and 120 preference shares in the plaintiff company subject to the articles and memorandum of association of company, remitting with the said applications Rs. 13,000 and Rs. 37,000 respectively as the amounts of deposit in respect of shares so applied for. On December, 1, 1919, the Board of Directors allotted to the 1st defendant 190 ordinary and 120 preference shares and notices of such allotment were sent to the first defendant. The first defendant paid the allotment moneys. A first call of Rs 100 on each of the ordinary and preference shares was made payable on September 1, 1921, by a resolution of the Board of Directors, dated July 20, 1921, and a notice was sent to the first defendant on August 12, 1921. The first defendant failed to pay the amount due on the first call, and notices were sent to him by the company and their solicitors respectively demanding the said amount with interest at nine per cent. After the institution of the suit the company were informed that Bansidhar

Durgadutt, the registered holder of the shares, was not an individual but a firm, and the plaint was consequently amended by adding the firm as second defendant.

A second call of Rs. 100 on the ordinary shares and preference shares payable on April 1, 1922, and a third call of Rs. 200 payable on November 10, 1922, were made by resolutions of the Board on March 10, 1922, and September 27, 1922, respectively, and notices were sent to the defendants. The defendants declined to pay the said calls and the plaint was amended so that the further claim for Rs. 93,000 and interest might be included in the suit.

The total sum claimed was Rs. 1,24,000 with interest at nine per cent. from the date of the various calls on the amount due on each call.

In their written statement the defendants admitted that Bansidhar Durgadutt was the registered holder of the 310 shares but they pleaded that the applications for the shares were made on the faith of certain representations made in the prospectus of the company.—

(1) That the applications would be received only up to Monday October 13, 1919.

(2) That the present issue was of 10,000 shares of $7\frac{1}{2}$ p. c. cumulative preference share of Rs. 1,000 each and 35,000 ordinary shares of Rs. 1,000 each. Out of these shares, 7,000 preference and 25,000 ordinary shares were to be taken up by the directors, agents and their friends, and the remaining 3,000 preference and 10,000 ordinary shares were for public subscription.

The defendants alleged the said representations were absolutely false. The company accepted applications long after October 13, 1919. The company had given to the public 5,000 preference shares instead of 3,000; and 17,000 ordinary shares instead of 10,000, the directors, agents and their friends taking up a much smaller number of shares than stated in the prospectus.

The defendants submitted that they were entitled to a rescission of the contract for the purchase of the said shares.

The defendants, therefore, counterclaimed asking (1) for a declaration that the contract for the purchase of 310 shares in the company was not binding on the defendants; (2) that the register of shareholders might be rectified by removing the defendants name therefrom; and (3) that

the plaintiff company might be ordered to pay to the defendants the sum of Rs. 62,000 paid to them for the said shares with interest.

The following issues were raised at the trial :—

1. Whether the applications for shares were made on the faith of the representation in the prospectus referred to in para (2) of the written statement.

2. Whether the said representations or any of them were false ?

3. Whether the defendants are entitled to rescission of the contracts to take shares referred to in the plaint ?

4. Whether the defendants are entitled to have their names removed from the register of shareholders of the company ?

5. To what sum, if any, are the plaintiffs entitled on their claim ?

6. To what sum, if any, are the defendants entitled on their counter claim ?

As far as I can gather from the records the defendants had not disclosed, before the written statement was filed, on what grounds they were objecting to pay the calls.

When the plaintiffs' solicitors wrote on February 1, 1922, demanding payment of the first call, defendants' solicitors replied on the 15th referring Messrs. Wadia and Gandhi to their letter of February 14 written on behalf of another client, in which they merely asked for inspection of the register of members commencing from date of the registration of the company, and of the minutes of the director's meeting when it was decided to make the call.

The learned Judge found as follows on issues Nos. 1 and 2 :

(1) That the applications for shares were not made on the faith of the representations in the prospectus referred to in para 2 of the written statement.

(2) That the representations were false. He, therefore, passed a decree as prayed for with costs as of a short cause and dismissed the counterclaim with costs.

The defendants have appealed.

The first alleged misrepresentation in para 2 of the written statement was not relied upon at the hearing. It was admitted that applications were received up to February 11, 1920, but it was not suggested that this representation in any way induced the defendants to make their applications for shares.

The defendants complained about the second representation on two grounds.

(1) That the number of shares mention-

ed therein was not true.

(2) Because it gave a wrong impression as to the holding of the directors, agents and their friends.

The history of events prior to the flotation of the company was as follows.

Messrs. Tata Sons Ltd., who had already floated two companies for generating electric energy by water power, had obtained a concession from Government for the development of a third project.

In July 1919, the firm issued a private and confidential circular, Exh. Y, giving an outline of the project both in its technical and financial aspects to over 100 selected individuals whose names appear in Exh. Z. Thereafter letters were received by the firm from various persons asking for shares to be reserved for them. Oral applications were also received, and all applications were dealt with under the orders of the partners in the firm, principally by Mr. Billimoria. It was unfortunate, as the evidence in the case shows, that proper care was not exercised in preparing accurate lists showing the number of such applications and the extent to which they were granted.

On September 18, 1919, the company was registered, and on September 25, 1919, the prospectus was issued. Application forms were sent to reservees which were marked with a letter and figure giving reference to the register of reservations. A circular letter, Exh. I, accompanied the forms asking that the forms should be filled in and returned together with the necessary deposit money.

A.P.S. to the circular was as follows :—

" You are kindly requested to write your name on the top of every application form in case you have distributed amongst your friends shares out of your holding."

The total number of shares allotted were:—

34,861 ordinary

8,697 preference

which were distributed as follows :—

Ordinary, to directors, agents	
and friends	19,818
to the public	15,043

Preference, to directors, agents	
and friends	5,293
to the public	3,404

The learned Judge was put to a very great deal of trouble to ascertain what number of shares had actually been reserved at the date of the prospectus.

The evidence relating to the reservation has been carefully set out at great length in the judgment and the conclusion arrived at was that the figures 25,000 ordinary and 7,000 preference shown in round numbers as reserved in the prospectus were substantially accurate, and that as to the numbers stated in the prospectus there was at the date of the prospectus no misrepresentation. The appellants' counsel in the course of the argument before us did not attempt to contest that finding.

The next question was whether the representation that the 25,000 ordinary and 7,000 preference shares were to be taken up by the directors, agents and their friends was true.

It was contended that the term "friends" includes only those persons who were directly influenced by the directors to apply for reservation of shares. They relied on the case of *Henderson v. Lacon* (1), but the facts in that case were peculiar and the misrepresentations in the prospectus were so obvious that it was hardly necessary to place a restricted meaning on the word "friends." The learned Judge was right, therefore, in not putting any emphasis on the word "influenced." I agree with the following passage in the judgment :—

"The word 'friend' is not only a social but a business friend. A business friend who applies for shares because, in the course of his business dealings with the directors, he acquired a knowledge of the project is correctly described in a prospectus as a 'friend'; and the influence would be merely the fact of that business connection."

But the judgment proceeds :—

"But the plaintiff company include in the term not merely business friends, but also the friends of these business friends. I think this further extension is inadmissible because whether in social or commercial relations a friend's friend is as often as not an enemy or a rival."

Surely, that remark would equally apply to a business friend. A person who in business had come to know of this project and applied to the agents for a reservation of shares would be, according to the learned Judge's definition, a friend, but in other branches of business he might be a rival. I

would prefer not to use the word enemy. Then the learned Judge says :—

"It is true that a friend who receives a reservation might apply for his friend's as their nominee. If that had been all there would perhaps be no misrepresentation. But the company went much further. Exhibit (1). They invited reservees to distribute shares to their friends. They reserved shares not only for individuals, but for the business circle which these individuals represented. They deliberately set up centres for private subscription and then described the shares so set apart for private subscription as reserved for their friends."

Now there does not seem to be much difference to my mind between the promoters of a company saying to A, "At your request we will reserve for you so many shares. We know you can dispose of them amongst your friends, if you want to, after allotment" and their saying to him, "Here are the application forms for the shares reserved for you. You have already told you do not want to hold them all yourself. So you can get your nominees to fill in the application forms, but put your name on the top so that we can trace the application to the particular reservation in your favour." The only practical difference would be that the reservee would not have to pay the application money and he would be saved the trouble of transferring the shares after allotment.

In other words, would it be misrepresentation if the promoters guaranteed that so many shares were to be taken up by their friends, when they knew perfectly well that those friends intended to make what they could of the favour shown to them by the reservation. I doubt it very much. Promoters may guarantee that shares will be taken up or have been taken up by reservees, but they cannot guarantee that the shares will be held by them. Failure to disclose material facts would amount to misrepresentation, but the fact that a holder of shares can sell them is common knowledge.

I will deal with a typical example out of those which have been relied on by the learned Judge to support his conclusion. 675 shares were reserved for Ambalal Sarabhai. The plaintiffs knew that he did not want them all for himself, as Mr. Bhabha deposed that the plaintiffs expected a large list of friends of his from Ahmedabad. The fact remained that

(1) [1877] L.R. 5 Eq. 249=18 L.T. 527=16 W.R. 328.

Ambalal was a reservee for 675 shares. If he had introduced his friends to the promoters and the promoters had accepted them as reservees, nothing could have been said. As he did not do so, the plaintiffs were entitled to represent him as the friend by whom the shares were to be taken up. It has thus been proved that the promoters had reserved substantially the number of shares given in the prospectus, and I am prepared to say that it was substantially correct to state that they were reserved for friends of the directors and agents.

Assuming, however, that the representation was untrue, as the learned Judge has found, the next question is whether the defendants were induced by the misrepresentation to take up the shares, for, in order to succeed in an action for deceit, the plaintiff must prove that he was actually deceived by the misrepresentation complained of: *Smith v. Chadwick* (2). I do not think that there is any doubt that it must be inferred from the evidence that Baijnath Bansidhar, the partner in the defendants' firm who made the application, had read the prospectus even if the whole of history cannot be believed. The prospectus appeared in the *Bombay Chronicle* of September 27, Exh. 22, which would be available in Calcutta on the 29th. Besides the application forms sent in by the defendants would be annexed to copies of the prospectus. Then if Baijnath after reading the prospectus applied for shares, it is for the plaintiffs to rebut the inference that the application was based on the representations made in the prospectus. In *Smith v. Chadwick*, (2) Jessel M. R. said:—"Unless it is shown in one way or another that the applicant did not rely on the statement the inference follows." In his evidence Baijnath said:—

"I can read English. I read the advertisement, I discussed with Ramcoover if shares should be taken. I thought that I should purchase the shares as only a small number were left for the public. I made an application on October 3. I got the forms in the shop of Dwarkadas itself. The form was attached to the prospectus...in January 1922 I learnt in Calcutta...there was some upset in the company. So I came to Bombay to make enquiries. I instructed my attorneys to write the letter of February 15. I applied

for shares as the prospectus stated that directors, friends and agents had taken up 25,000 ordinary and 7,000 preference. I thought from that that it must be a profitable concern. I applied as there was only a small number left for the public."

In cross-examination he said:—

"From the first I understood that the directors, agents, and friends had taken up 25,000 and 7,000 shares. I would not have applied if I had understood that they were only ready and willing to take up that number."

This last answer really disposes of the defendant's case. The shares were applied for on a misreading of the prospectus and not on the faith of the representation which was actually made.

The learned Judge, however, has come to the conclusion that the defendants were not induced to apply for the shares by what was represented in the prospectus on another ground which it is more difficult to justify. It is practically impossible to ascertain what is passing in the mind of a man who after reading the prospectus of a company applies for shares. Apart from his misreading the terms of the prospectus, Baijnath's story as to how he came to apply for the shares would be the natural story of any applicant who had read the prospectus. The fact that the promoters gave out the amount of support they had received in advance for the flotation of the company would inevitably weigh on the minds of the public, and would influence them when sending in applications for shares. There might also be other considerations, and the learned Judge appears to think that those afforded the real reason for Baijnath's deciding to send in his applications. Undoubtedly in the middle of 1919, when money was plentiful, the public were ready to subscribe to any company promoted by persons of repute. In August 1919, the defendants must have heard of the impending flotation of the plaintiff company because they sent a cheque for Rs. 2,500 and asked that twenty-five shares should be reserved for them. They were anxious to get shares then before the prospectus was issued to the public, and when they were told that the promoters did not want their money and that they should apply after the prospectus was issued, they must have realised that the promoters at that time were not prepared to deal with any chance stranger who might apply for a reserva-

(2) [1882] 20 Ch. D. 27=51 L.J.Ch. 597=46 L.T. 702=30 W.R. 661.

tion. Even though they asked in October for a far larger number of shares it is not an unfair inference that they made the application because they thought it would be a profitable investment. If they had sent in their application for 500 shares because of the limited number of shares offered to the public, desiring and expecting to be allotted only a proportion of what they had asked for, although as a matter of fact Baijnath did not say anything to this effect, they would have no reason to complain as they were only allotted 310 shares, and the suggestion made in the written statement, that, because some of the shares reserved were allotted to the public to the disappointment of some of the reservees, there was a misrepresentation, has no substance in it. In fact it counts against the defendants. In the case of another company floated by the same agents a few months before the plaintiff company's project was entertained, there were loud complaints from the public that too many shares were reserved for the promoters and their friends, and so the directors of the plaintiff company were anxious to increase the number of shares available for the public to satisfy the demand. If when the business of allotment was going on, the plaintiff company had told the defendants, "We are reducing the shares reserved for our friends and increasing the shares available for the public, and you may think that a ground for rescinding your contract so that we will take back your shares," the defendants would only have felt more inclined to hold to what they had got.

I think, therefore, that the true position when the prospectus was issued was this. The defendants were told that only 10,000 ordinary shares out of 35,000 were available for the public and so at the highest they may have applied for more shares than they wanted. The real inducement to invest in the company was because money awaiting investments was plentiful, the general reputation of the promoters with the public was excellent, and consequently defendants thought they were getting a favourable opportunity for investing their money. When the partly paid shares could not be disposed of at a premium, when large amounts for calls became due, and money was much scarcer, they bethought themselves what was the best way of evading their liability.

We think the judgment appealed against was right and the appeal is dismissed with costs.

Crump, J.—I entirely agree.

Appeal dismissed.

1925 BOMBAY 277

SHAH, Ag. C. J. AND KINCAID, J.

Becharsang Bhupatsang—Defendant—Appellant.

v.

Naran Moti Meghji — Plaintiff—Respondent.

Second Appeal No. 715 of 1924, Decided on 30th September 1924, from the decision of the Joint J., Ahmedabad, in Appeal No. 283 of 1920.

Civil P. C., Sch. III Para I—Mortgage decree—Executing authority may mortgage the property to satisfy decree.

It is open to the executing authority to effect a mortgage of a part of the property to satisfy a mortgage decree. [P 278 C 1]

D. G. Dalvi—for Appellant.

D. W. Pilgionkar—for Respondent

Shah, Ag. C. J.—We have heard the learned pleader for the appellants in this case. The history of the execution of this decree is long, but it is not necessary to go into the details of that history for the purposes of the short point which has been argued in support of this appeal.

It appears that a decree for sale of the mortgaged property was passed in favour of the plaintiffs on November 17, 1896 and after a number of proceedings ultimately it was sent for execution to the Collector along with two other money decrees which were then pending before the Talukdari Settlement Officer for execution against the same judgment debtors. That Officer made a certain arrangement for the satisfaction of the decrees including the decree in question which is recited in the judgment of the first Court in these terms:—

"The compromise for the dues of the plaintiffs under all the three decrees, which on November 16, 1918, amounted to Rs. 31,500 was settled for Rs. 15,750 by mortgaging 105 acres of defendants' lands to the plaintiffs. On November 16, 1918, the Talukdari Settlement Officer Mr. Gordon writes below the plaintiffs' statement before him embodying all the terms: 'approved; the creditors agree before me.'

The said compromise was sent to this Court for being certified, and it was accordingly certified on December, 7, 1918"

An application against this arrangement was made on December 9, 1918, by the judgment-debtors which has given rise to this second appeal.

Both the lower Courts have rejected the applications made by the judgment-debtors against the arrangement, and the whole question is whether it was open to Talukdari Settlement Officer to effect this arrangement in execution of the mortgage decree. The only ground which is urged before us is that it was not so open to him to effect this arrangement and that under paragraph 8, Schedule III of the Code of Civil Procedure, he could only sell the property. Having regard to the stage of the execution proceedings reached at the time, it is urged, the only course open to the Talukdar Settlement Officer was to sell the property. This argument in effect means that the executing authority could do nothing in respect of this decree because the sale of the Talukdar's estate without the sanction of the Government is quite out of question under S. 31 of the Gujarat Talukdars' Act. At a very early stage of the execution of this decree it was made abundantly clear that the property could not be sold as the necessary sanction of the Government could not be obtained. Under the circumstances the Talukdari Settlement Officer had to find out some means of satisfying this decree nearly more than twenty years after it was passed during which interval practically nothing could be done to satisfy the claims of the decree-holders.

In this appeal we are only concerned with the legal question as to whether the objection that it was not open to the executing authority to effect a mortgage of a part of the property is good. It is clear that under paragraph 1 of the third Schedule he would have such a power. It is also clear that paragraph 2 of the third Schedule would not apply to a mortgage. The learned pleader for the appellants has realised the difficulty and has not been able to satisfy us that in the case of a mortgage decree the provisions of paragraph 8 would apply. But the argument urged is that this mortgage decree really ceased to be a mortgage decree on account of the application made by the decree-holder so far back as 1899. At that time, as the sale could not be effected, he sug-

gested that some other means of satisfying the decree should be devised. That application does not in our opinion mean that the decree-holder agreed that it should be treated as a money decree and that it should cease to be a mortgage decree. It remained thereafter, as it was before, a mortgage decree, and as such, it was under execution at the time when this arrangement was made. The arrangement effected by the executing authority is not shown to be invalid in any way. We, therefore, dismiss the appeal with costs.

Appeal rejected.

1925 BOMBAY 278

MACLEOD, C. J. AND CRUMP, J.

The Secretary of State for India—
Plaintiff—Appellant.

v.

*Manilal Harivallavdas Bhagat—*Defendant—Respondent.

First Appeal No. 155 of 1923, Decided on 25th November 1924, from the decision of the Dt. J., Ahmedabad, in Suit No. 34 of 1922.

Bombay Dt. Municipal Act (Bom. Act III of 1901) Ss. 42, 54 and 58—Rules under S. 53, R. 3—Primary schools—Government inspection disallowed—Maintenance of schools is not 'misapplication'.

The word 'misapplication' in S. 42 Means the wrong application of funds; the use of funds for purposes outside the scope of the Act. The use of funds for the maintenance of primary schools which the Government Inspectors are not allowed to inspect is not 'misapplication'.

[P. 279, C. 2; P. 280, C. 1]

*Kanga and S. S. Patkar —*for Appellant.

*G. N. Thakor, H. V. Divatia, Jinnah, A. G. Desai and N. P. Desai—*for Respondent.

Macleod, C. J.—This suit was filed by the plaintiff appellant in the District Court of Ahmedabad to recover from eighteen persons who were members of the Ahmedabad Municipality from March 1, 1921 to December 17, 1921, and from a nineteenth person who was a member from October 13, 1921, only, the sum of Rs. 1,68 600 being the amount of expenditure incurred by the Municipality on the maintenance of the primary schools during the suit period, on the allegation

that it was misapplied, as the schools were maintained during that period contrary to the provisions of the Bombay District Municipal Act, Bom. Act. III of 1901, and the rules framed thereunder. The claim was afterwards decreased by amendment to Rs. 1,37,709-5-8 to be recovered against all the defendants jointly and severally, except defendant No. 16 against whom the claim was limited to Rs. 80,825-3-8. Defendants Nos. 2, 3, 4, 9 and 12 put in a joint written statement, the other defendants filed separate written statements.

The Judge dismissed the suit with costs allowing only one set of costs amongst all the defendants as they had substantially one defence to make.

Twenty-one issues were raised, but issue No. 12 was the main issue in the case, and the only one which has been argued before us in appeal.

"Have the Municipality spent any money beyond that sanctioned by the budget?"

"If not, is there any misapplication of the Municipal Fund?"

The facts stated in the plaint may be taken as admitted by the defendants in their pleadings.

The following are the pertinent sections of the Act:—

"S. 42. Every councillor shall be personally liable for the misapplication of any fund to which he shall have been a party, or which shall have happened through, or been facilitated by, a gross neglect of his duty as a councillor, and may be sued for recovery of the moneys so misapplied as if such moneys had been the property of Government."

S. 54. It shall be the duty of every Municipality to make reasonable provision.

(1) for the following matters within the Municipal district under their authority, namely:—

(p). establishing and maintaining primary schools:—

"S. 58. The management, control and administration of every public institution exclusively maintained out of municipal property and funds shall vest in the Municipality by which it is maintained:

Provided that the extent of the independent authority of any Municipality in respect of public education, and their relation with the Government Educational Department shall from time to

time be prescribed by the Governor in Council."

Of the rules framed by Government under the provisions of S. 58 the only rule which the appellants have relied upon before us as having been infringed by the respondent is rule 3 which directs that Municipal schools shall, subject to the proviso in rule 2 (which in this case it is unnecessary to consider), be provided for all castes or classes of the community and shall be open to inspection and examination at all times by the Government Inspecting Staff. The Municipality shall in each case make suitable arrangements in communication with the Inspector for the annual examination required by the Educational Department.

S. 52 was also relied upon by the appellant, but that section was framed in order to impose the obligation on Municipalities to apply all their properties and funds subject to the provisions of the Act and for the purposes of the Act *within the limits of the Municipal District*, and is of no assistance towards deciding whether the monies in the suit were misapplied.

Generally speaking it may be admitted that a Municipality would be bound to apply its properties and funds subject to the provisions of the act.

Owing to the action taken by the Municipality of which the defendants were members, the Educational Department were in effect prevented from examining the primary schools established and maintained by the Municipality during the suit period. The appellant contended that because the examination could not be made the schools ceased to be primary schools and so the Municipal funds expended on them had been misapplied.

The word 'misapplication' in S. 42 must be given its ordinary dictionary meaning. It means the wrong application of funds, the use of funds for purposes outside the scope of the Act.

The appellant then would have to prove that the schools on which the money claimed as having been misapplied were not primary schools as contemplated by the Act.

It is not necessary to consider the exact definition of a primary school, because it has not been contended by the appellant that the instruction given to the children attending them was other

than that prescribed by the Educational Department for primary schools.

Most of the arguments addressed to the lower Court were either unnecessary or irrelevant and were rightly discarded by the Advocate General who relied on the following syllogism.

A primary school to which Municipal funds can be applied is a school established and maintained according to the Act and the rules framed under the Act. A school established and maintained by a Municipality which cannot be inspected by the Educational Department owing to the action of the Municipality in closing the doors to the Inspector is not such a primary school. The money, therefore, which has been spent on such school has been misapplied.

The fallacy in the argument is this, that because the Inspector is not allowed to see what is going on inside the walls of a school it does not follow that the school is not a primary school maintained in accordance with the Act. It would have to be proved that the school was being used for purposes other than that of primary education. That would have to be proved like any other fact. The ordinary method would be by the annual inspection and report by the Educational Department. If that became impossible from one cause or another, some other kind of proof would have to be led. Rule 3 merely prescribes the ordinary method whereby Government are enabled to satisfy themselves that the Municipality are doing their duty. In other words, it is a rule of procedure, and its infringement could in no way affect the character of the schools referred to in the plaint.

The appellant accordingly has failed to prove that Municipal funds have been misapplied by the respondents.

We are much indebted to the District Judge for his painstaking judgment but with due respect it was hardly necessary to set out at length the history of primary education in the Presidency.

In my opinion the appeal should be dismissed with costs.

Crump, J.—There is no dispute about the facts of this appeal and, so far as they are necessary, they are shortly as follows:—

The defendants were in 1921 councillors of the Ahmedabad Municipality. In February 1921, by certain Resolutions the Municipality decided that no further edu-

cational grant should be received from Government and that the annual examination and inspection of Municipal schools should no longer be conducted by the Deputy Educational Inspector or his assistants. In pursuance of this decision the Educational Department was prevented from holding the annual examination and inspection from March 1, 1921, to December 17, 1921.

The only question which has been argued before us is whether the defendants can be held to have misapplied the monies expended on the Municipal schools during this period. The plaintiff relies upon S. 42 of the Bombay District Municipalities Act (Bom. Act III of 1901). By that section "every councillor shall be personally liable for the misapplication of any fund to which he shall have been a party."

What is meant by "misapplication" in this section? The word has no technical meaning and is no doubt used in its popular sense. To 'misapply' means to apply to a wrong purpose, that is, to a purpose which is not that which the circumstances indicate as correct, or a purpose which is for any reason forbidden. Used in the statute under consideration it is probably an exhaustive definition to say that "To misapply is to apply to a purpose which the Act neither permits nor requires." The functions of a Municipality are either obligatory or discretionary, and the Municipal funds must be expended on those functions and no others. The obligatory functions are those which the Act requires, the discretionary functions are those which the Act permits. Whether the definition of misapplication which I have suggested is exhaustive or not it is at least sufficient for the disposal of this appeal.

To provide for primary education is one of the obligatory functions of the Municipality. S. 54 runs as follows:—

"54. It shall be the duty of every Municipality to make reasonable provision (1) for the following matters within the Municipal District under their authority namely:—

(p) establishing and maintaining primary schools.

To establish and maintain primary schools is thus one of the obligatory functions of a Municipality. Money so expended is money applied to a purpose

which the Act requires, and is not, therefore, misapplied.

Are then the schools which this Municipality maintained "primary schools"? The words are nowhere defined in the Act. A 'primary' school is a school where 'primary' education is imparted. I am not aware that the word 'primary' has acquired any special meaning. "Primary" education means education in its first stages and nothing more. This much at least is clear that the words do not in themselves connote anything in the way of Government support or Government control.

The evidence in this case shows—indeed the point is not contested—that the education imparted in the schools in question was 'primary education' in the sense which I have indicated. It follows, therefore, that up to the point which we have reached, the expenditure was expenditure on primary schools, and therefore there was no misapplication.

But it is sought to extend the meaning of the words 'primary schools.' I do not say that the argument was put that way, but reduced to its simplest terms that is its meaning. In order to understand the point sought to be made it is necessary to turn to other portions of the Act. I pass over S. 52 of the Act which appears to me to have no bearing on the question at issue. S. 58 runs as follows:—

"58. The management, control and administration of every public institution exclusively maintained out of Municipal property and funds shall vest in the Municipality by which it is maintained.

Provided that the extent of the independent authority of any Municipality in respect of public education, and their relations with the Government Educational Department shall from time to time be prescribed by the Governor in Council."

The section means this as between Government and the Municipality: "You (the Municipality) have the management, administration and control of public institutions maintained out of your funds except schools. As to schools we (the Government) retain power to prescribe the extent of your independent authority and your relations with the Government Educational Department."

In exercise of this power Government have published certain rules. The controversy turns mainly round rule 3 which runs as follows:—

"3. Municipal schools shall...be open for inspection and examination by the Government inspecting staff. The Municipality shall in each case make suitable arrangements in communication with the Inspector for the annual examination required by the Educational Department."

It is not, in my opinion, necessary to consider the effect of the other rules or the breach thereof, if any. The Municipality in this case declined to comply with rule 3.

I have said that it is sought to extend the meaning of the words 'primary schools' and the argument can now be stated. It is as follows. "Primary schools for the purposes of the Act must be taken to mean primary schools maintained in accordance with the rules framed by Government. These schools were not so maintained. Therefore, they are not primary schools, and the money spent on them has been misapplied." The argument so stated is not devoid of plausibility, but there is a fallacy in it. I cannot accede to the proposition that where the legislature speaks of 'primary schools' it must be held to mean "primary schools maintained in accordance with such rules as Government may from time to time frame, and no other primary schools." The Act says the Municipality shall maintain primary schools. Government by rules says "you shall maintain those primary schools in such and such a manner." It is not, in my opinion, possible to say "The Municipality have not maintained their primary schools in the manner enjoined by Government: therefore they have not maintained primary schools." Unless it can be said that these schools are not 'primary schools' there can be no case of misapplication. I would invite attention here to issue No. 10 framed by the lower Court at the instance of plaintiff. It runs thus:—

"10. Whether rule 3 of the rules relating to inspection was obligatory and if so whether objection to the inspection of schools would convert expenditure towards the maintenance of primary schools into a misapplication of the Municipal Funds."

That issue contains within itself the same argument in another form. "The schools no doubt were primary schools as required by the Act, but when the Municipality refused inspection the schools ceased to be primary schools." It is not permissible to read into the Act

words which it does not contain and that plain proposition is decisive of this appeal.

It follows that no misapplication has been proved and that the suit fails.

I may add that, in my opinion, no useful purpose would be served by a consideration of the position of the Municipal councillors as trustees under S. 50 of the Act. We are not concerned with any property of the description specified in that section. If the councillors are regarded as trustees for all purposes of the Act the considerations which I have already set out apply equally to their conduct in that capacity.

Appeal dismissed.

1925 BOMBAY 282 (1)

MACLEOD, C. J. AND CRUMP, J.

Bhimsangji Chhatrasangji—Appellant.

v.

Dolatsangji Hamersangji—Respondent.

Appeal No 42 of 1923, Decided on 25th November, 1924, from an Order of the Dt. J., Broach, in Appeal No. 56 of 1920.

Court Fees Act, S. 7 (iv) (c)—Declaration that plaintiff was owner of certain Toda Giras Hak annuity and entitled to recover same—S. 7 (iv) (c) applies—Same value applies for jurisdiction purposes as for Court-fees—Suits Valuation Act, S. 8.

A suit for a declaration that the plaintiff was the owner of the Toda Giras Hak annuity of a certain amount received by a certain lady, as her heir and as such entitled to recover the same, comes within S. 7 (iv) (c) and the Court-fee stamp would be according to the amount at which the relief sought was valued in the plaint and the same is the value of the suit for purposes of jurisdiction. [P 282 C 2]

H. V. Divatia—for Appellant.

M. T. Telivalla—for Respondent.

Macleod, C. J.—The plaintiff sued *inter alia* for a declaration that he was the owner of the Toda Giras Hak of Rs. 500 received by Bai Surajkuvar as her heir and as such entitled to recover the same. The total claim was valued for Court fees at Rs. 2143-5-8 and also for jurisdiction. The suit was tried by the Second Class Subordinate Judge at Ankleshwar who passed a decree in favour of the plaintiff.

On appeal to the District Judge, an issue was raised whether the Court had jurisdiction to entertain the suit. The District Judge held that the suit was not

within the jurisdiction of the Subordinate Judge of the Second Class at Ankleshwar, and ordered the plaint to be returned for presentation to the proper Court under rule 10 of Order VII of the Civil Procedure Code.

We think that that order was wrong. It depends in the first place, upon what value should be placed on the first relief claimed, namely, the declaration that the plaintiff was the owner of the Toda Giras Hak of Rs. 500. The District Judge thought the claim was for payment of an annuity, and the value for the purposes of the Court-fee under S. 7 (ii) would then be ten times the amount claimed to be payable for one year. We do not think it can be said that the plaintiff was claiming payment of an annuity, the suit really comes within S. 7 (iv) (c) "to obtain a declaratory decree or order where consequential relief is prayed." All that the plaintiff was seeking was a declaration that he was entitled to an annuity which was enjoyed by Bai Suraj and having got that declaration, he would be entitled to go to the official whose duty it was to pay the annuity and demand payment according to the decree of the Court. The Court-fee stamp would be according to the amount at which the relief sought was valued in the plaint, namely Rs. 500.

The next question is what would be the value of the suit for the purposes of jurisdiction. Under S. 8 of the Suits Valuation Act, the value as determinable for the computation of Court-fees in suits other than those referred to in the Court Fees Act, 1870, S. 7, paragraphs v, vi, ix and paragraph x, clause (d), is the same for purposes of jurisdiction.

Accordingly the appeal will be allowed and the appeal will be sent back to the District Judge for being heard on its merits. The appellant will be entitled to his costs of the appeal.

Appeal allowed

1925 BOMBAY 282 (2)

MACLEOD, C. J. AND CRUMP, J.

Gulbaji Ajisigi & Co.,—Appellant.

v.

Rustomji Kharsedji Banatwalla—Respondent.

O. C. J. Appeal No. 49 of 1924 & Suit No. 175 of 1922. Decided on 12th December, 1924, from the decision of Marten, J.

Will—Construction—Previous clause giving—Property as 'gift'—Subsequent clause directing disposal after the donee's death—Legatee was held to take life interest—Succession Act, S. 69.

The duty of the Court while construing a will is to find the intention (of the testator) looking at the whole provisions of the will.

A clause in a Parsee's will stated as follows with reference to a certain property :—" This is given as a gift to R." A later clause provided :—" Should R die and should he then leave a son, such his son shall afterwards be the owner thereof." The clause then provided for the manner of distribution if no son was left by R.

Held : that the first clause taken by itself gave an absolute estate to R but that the two clauses should be read together and their combined effect was to confer only a life estate on R [P. 286, C. 2.]

Bahadurji—for Appellant.

Kanga and B.J. Desai—for Respondent.

Macleod, C. J.—Kharsedji Jamasji Banatwalla died on July 10, 1870, leaving a will dated May 5, 1870, probate of which was granted to his son Edulji on June 14, 1871. Under clause 8 of the will, certain property was given to Rustomji, the second son of the testator. By clause 10 of the will, certain limitations were sought to be imposed on Rustomji's interests in the property. In 1908 he mortgaged the property to the plaintiffs in this suit and granted two further charges dated December 9, 1909, and July 10, 1911. In 1917 Rustomji took out an originating summons to determine the true construction of the will with regard to the interest he acquired thereunder in this property. The present plaintiffs were not parties to those proceedings which were evidently of a friendly nature between Rustomji and other members of his family. By the order of the Court of July 30, 1917, it was declared that Rustomji only took a life interest in the property. It was not until 1921 that the plaintiffs became aware of that order, which could not possibly operate as *res judicata* against them. Consequently they filed this suit asking for a declaration that Rustomji was absolutely entitled to the suit property.

The lower Court has given the plaintiffs a declaration that Rustomji only was given a life interest in the property and dismissed the suit against the other defendants. Defendants Nos. 2 to 5 were the sons, the 6th and 7th defendants were the daughters and the 8th defendant was the wife of the first defendant.

The plaintiffs have appealed, and the only question which has been argued

before us was whether, on a proper construction of clauses 8 and 10 of the will, the first defendant took a life estate or an absolute estate.

Clause 8. "As to my second son Chi. Roostomji. There was sold to Parsi Kharsedji Jamasji Workingboxwalla one hundred and ninety Burgas of vacant ground situated near the Grant Road, upon a lease for ninety-nine years. Therefrom Burgas forty and half were repurchased. Deducting them (from the said 190 Burgas) there remain Burgas 149½ one hundred and forty nine and a half which, at the rate of Rs 6¼ six and a quarter per Burga annum, (yields an income of) Rupees 934-6 annas. Nine hundred and thirty four and annas six per annum. This is given as a gift to Chi. Roostomji. After my decease the income of the ground, that is the rent, is to be collected from those persons who are possessed thereof and credited to the name of the Chi. Roostomji in (the books of) the shop. For Chi. Roostomji is now seventeen years old when therefore he shall arrive at the age of 21 twenty one years, the said ground is to be made over to him, and as to the moneys which may have been collected and credited, the principal together with interest thereon at the rate of 5 five per cent is to be paid over to Chi. Roostomji. It is to be paid over by Chi. Edulji."

Clause 10. "The property which is in the above eighth Clause directed to be given to Chi. Roostomji is to be given (to him) in accordance therewith. And afterwards should my son Chi. Roostomji die which God forbid and should he then leave a son, such his son shall afterwards be the owner thereof; should he however leave daughters, an estimate is to be formed of the value of the said Estate at that time and out of the same Four annas in the rupee are to paid to his daughters. And should he have no children, two annas in the rupee is to be paid to his widow. And as to the whole residue which should then remain Chi, Edulji and his heirs are to become the owners thereof.

It was first contended that clause 10 was repugnant and void as being contrary to the terms of clause 8 whereby the property was gifted to the first defendant. The second contention was that S. 111 of the Indian Succession Act applied so that the gifts over bequeathed by clause 10 could only take effect if the first defendant had died in the life-time of the testator. Th

learned Judge has referred to the principles which should guide the Court in construing a will. Those principles have been laid down in innumerable cases, but they are not always easy to follow. The Court must give to each expression used by a testator its plain meaning except where there is authority for giving a particular legal interpretation to a particular form of words. As far as possible effect must be given to the intentions of the testator as shown by the terms of the will taken as a whole and if different clauses appear contradictory attempt must be made to reconcile them. If two clauses are irreconcilable under S. 75 of the Indian Succession Act the later clause prevails. But when the Court having followed those principles has come to a certain conclusion, if we agree with the judgment of Joyce J. in *In re Sanford, Sanford v. Sanford* (1), we ought to examine the authorities to see whether any one of them prevents us from adopting that conclusion as final. That may be permissible and even desirable when construing an English will drawn by English lawyers in what is recognised an ordinary legal phraseology, but when we have to construe a vernacular will like the one before us the safest course in my opinion is to adhere to principles and avoid if possible any examination of decided cases, or in any event the English cases. In India the Indian Succession Act has attempted to codify the law as far as it can be ascertained from those cases but generally speaking the illustrations to the sections of the Indian Succession Act being taken from English decisions are of little use in construing a vernacular will. For instance when we come to discuss the question whether an absolute gift can be cut down by later provisions in a will, if we attempt to derive any clear principle on which the Court should act from the English cases we find a large number of cases which it is difficult to adjust with each other. It has been laid down that if there is in a will an absolute gift it is not to be cut down except by clear limitations in the rest of the will. That sounds plain enough, but after considering the various cases on that question there is very great difficulty in obtaining a guide as to what are and what are not clear limitations. However, S. 82 of the Indian Succession Act says that "where property is bequea-

thed to any person, he is entitled to the whole interest of the testator therein, unless it appears from the will that only a restricted interest was intended for him." The Act also deals with irreconcilable clauses, but there is no mention of the word 'repugnant.' If repugnancy is different from irreconcilability what is to happen when a later clause is repugnant to an earlier clause? There are authorities which appear to show that repugnancy in a later clause renders that clause null and void.

It cannot be denied, however, that, as pointed out by the learned Judge, decisions of the Privy Council, in spite of their lordships' warning not to apply decisions on English wills to the wills of Indians, or even decisions on other wills whether English or Indian [see *Narendra Nath Sircar v. Kamalbasini Dasi* (2)] do sometimes depend on the application of some English rule of construction, which has been laid in English cases: see *Karkushru Bezonji v. Shirinbai* (3) and *Shirinbai v. Ratanbai* (4).

Dealing with the will in suit, the learned Judge continues: "The defendants Nos. 2 to 8 have an alternative construction to that put forward by the plaintiffs, and it is this, that if one cuts down the interest of Rustomji to a life interest, then clause 10 is perfectly intelligible, and the whole will becomes quite simple. What then, so far as this will is concerned, are the reasons for and against adopting that construction?" and he concludes. "Looking then at this will I see no difficulty in confining the interests of Rustomji to a life interest. In that case there is no repugnancy under clause 10. It is merely an ordinary case of a gift for life to a testator's son with remainder to the testator's grand-children." But the defendants' argument begs the whole question. They premise that clause 8 gives Rustomji a life interest and therefore clause 10 deals with the remainder, without any repugnancy. But the learned Judge concludes that clause 8 gives an absolute estate, and

(2) [1896] 23 Cal. 563=23 I.A. 18=6 M.L.J. 71=6 Sar. 663 (P.C.)

(3) [1918] 43 Com. 88=21 Bom. L.R. 130=23 C.W.N. 419=51 I.C. 481=9 L.W. 485 (P.C.)

(4) [1921] 45 Bom. 711=48 I.A. 69=40 M.L.J. 277=(1921) M.W.N. 165=19 A.L.J. 215=23 Bom. L.R. 618=25 C.W.N. 890=38 C.L.J. 271=29 M.L.T. 236=14 L.W. 183=60 I.C. 222 (P.C.)

(1) [1901] 1 Ch. 939.

the fact that express words signifying absolute ownership are absent, is, he remarks, "a slight circumstance to be observed on." The words in clause 8 are, "This is given as a gift to Rustomji." We cannot therefore get over the difficulty in this summary fashion. Clause 10 is repugnant to clause 8. It deals with the remainder to the property, which has already been wholly disposed of.

Mr. Desai has argued that S. 111 of the Indian Succession Act is applicable. That section says :

"Where a legacy is given if a specified uncertain event shall happen, and no time is mentioned in the will for the occurrence of that event, the legacy cannot take effect, unless such event happens before the period when the fund bequeathed is payable or distributable."

Illustration (a) is as follows :—

A legacy is bequeathed to A, and, in case of his death, to B. If A survives the testator, the legacy to B does not take effect.

In other words by a statutory construction to be placed on such a gift to B it is construed as if the testator had said: "If A dies before me B shall take but if A survives me he will take absolutely." The logical deduction must be that if the testator had only said, "I give to A but if A dies after me B shall take", the bequest to B is null and void. It makes little difference whether it is null and void according to the doctrine of repugnancy, or owing to the statutory construction to be placed on the bequest which gives effect to that doctrine. I do not think myself that S. 111 has any bearing on the construction of this will. I think that the difficulty which it has been suggested exists is purely artificial, and is due to clauses 8, 9 and 10 of the will having been treated as three separate clauses whereas they are really one. That perhaps was what was meant by the defendants' argument in the lower Court, though it certainly was not so expressed. Otherwise the discussion, and the judgment would have been shortened considerably, if it had not been taken for granted that clause 8 by itself gave an absolute estate. If it had been recognised that the gift to Rustomji was really in the middle of a clause, nothing further could have been said.

We agree, therefore with the learned Judge that Rustomji took a life interest

in the property referred to in clause 8 and dismiss the appeal with costs.

Crump, J.—On May 5, 1870. Khar-sedji Janasji Banatvalla made a will. He died on July 10, 1870. The testator at the date of the will and at the date of his death had two sons Edulji and Rustomji, and four daughters. By paragraph 8 of the will certain property was given to his son Rustomji. In 1908, 1909 and 1911 Rustomji alone executed certain mortgages and charges in favour of the plaintiffs. Rustomji is the first defendant. Defendants Nos 2 to 5 are his sons. Defendants Nos. 6 and 7 are his daughters. Defendant No. 8 is his wife. The plaintiffs allege that on a true construction of the will, defendant No. 1 took an absolute interest in the property in suit. The defendants contend that on a true construction of the will defendant No. 1 is entitled to a life interest only. Para 1 of the will appoints Edulji executor and directs him to distribute the estate after the expiration of thirteen months from the decease of the testator. Paras 2 to 7 set out certain bequests of other property to Edulji. Para 8 recites that the property in suit is given to Rustomji. Para 9 directs that the marriage expenses of Rustomji, who was seventeen years old and unmarried at the date of the will, are to be defrayed by Edulji out of the property given to him. Para 10 contains directions as to the disposition of the property given to Rustomji by clause 8 after Rustomji's death. Paras 11 to 15 are not material for the purposes of the question to be determined.

The question arises thus. Para 8 of the will would appear to give an absolute interest to Rustomji. Para 10 provides for an absolute interest to the grandchildren after Rustomji's death. What then is the true construction? The learned trial Judge has held that para 8 standing alone would give an absolute interest to Rustomji but that the effect of the will read as a whole was to confine the interest of Rustomji to a life interest.

The first thing to be done in construing a will is to read the will as a whole and to endeavour to gather its meaning when so read. S. 69 of the Indian Succession Act is as follows :

"The meaning of any clause in a will is to be collected from the entire instrument, and all its parts are to be construed with reference to each other."

As remarked by their lordships of the Privy Council in *Shookmoy Chandra Das Monoharri Dassi* (5) the duty of the court "is to find the intention [of the testator] looking at the whole of the provisions of the will." For the purposes of the present question it is therefore necessary to read together paras 8 and 10 of the will, and to endeavour to discover the intention of the testator. Those paras are set out in the judgment under appeal and need not be repeated here. The material words in para 8 are: "This is given as a gift to Rustomji." If those words stood alone their meaning would be free from doubt. S. 82 of the Indian Succession Act runs as follows:—

"Where property is bequeathed to any person, he is entitled to the whole interest in the property therein, unless it appears from the will that only a restricted interest was intended for him."

There is no question here as to the applicability of the Indian Succession Act, and the Court is bound to adopt this rule which is part of the Chapter of that Act as to the construction of wills. Upon this point, and indeed as to other questions of the construction of wills, I would cite the remarks of their lordships of the Privy Council in *Narendra Nath Sircar Kamalbasini Dasi*: (2)

"To search and sift the heaps of cases of Wills which cumber our English Law reports in order to understand and interpret Wills of people speaking a different language, trained in different habits of thought, and brought up under different conditions of life seems almost absurd... The Indian legislature may well have thought it better...to exclude all controversy by positive enactment. At any rate in regard to contingent or executory bequests the Indian Succession Act, 1865, has laid down a hard and fast rule... without speculating on the intention of the testator."

Their lordships were there dealing specifically with S. 111 to which reference must be made shortly. But it is clear from those remarks that where the Indian Succession Act is clear upon a point it is appropriate to refer to decided cases. The question, therefore, is whether on the words of that section "it appears from this will that only a restricted interest was intended for him (Rustomji)." That

question must be answered by reading paras 8 and 10 together. The first sentence of para 10 refers to the directions in para 8, and re-affirms those directions. The testator had in mind that point of time when those directions had been carried into effect, that is to say, that Rustomji had attained the age of twenty-one years, and had been put in possession of the property. The will then proceeds "and afterwards should my son Rustomji die which God forbid and should he then leave a son such his son shall afterwards be the owner thereof." I agree with the learned trial Judge that the words "should my son Rustomji die which God forbid" are no more than an euphemism and that the plain meaning is "on the death of my son Rustomji." The meaning is in substance "after the death of Rustomji if he leave a son his son shall be the owner of the property."

Para 8 is therefore not consistent with para 10. "Where two clauses or gifts in a will are irreconcilable, so that they cannot possibly stand together, the last shall prevail" (Indian Succession Act, S. 75). Can the two gifts be reconciled? Yes, if reading the two clauses together it appears that "a restricted interest was intended for Rustomji." The rule in S. 75 should only be applied in the last resort. And in my opinion the decision of the learned trial Judge is correct and that it must be taken that the testator intended a life interest for Rustomji. If the rule in S. 75 were applied the result would be that on the birth of a son no interest would be left to Rustomji, a conclusion which should not be accepted unless it is inevitable. It is not indeed the case of either party.

But it is said that the case falls within S. 111 of the Act. The construction sought to be put on the will is that the words used in clause 10 mean "if Rustomji should die before the death of the testator." It is argued that there is a specified uncertain event, viz., the death of Rustomji before the death of the testator, and that as that event did not happen clause 10 is inoperative. That is not in my opinion an admissible construction of the words of the will. It is not in my opinion possible to hold that the testator had in mind the possibility of the death of Rustomji before his own death, nor do I precisely apprehend how S. 111 can be applied to the circumstances of this case.

(5) [1881] 11 Cal. 684—12 I. A. 103—4 Sar. 639.
(P. C.)

The gift to the sons of Roostomji was not a gift to persons *in esse*, but a gift to persons not in existence at the date of the will. A bequest to A for his life and after his death to A's eldest son A having no son at the time of the testator's death is valid if the later bequest comprises the whole of the remaining interest of the testator in the thing bequeathed. That appears to be the true construction of the will and S. 111 of the Act has no operation.

Appeal dismissed.

★ 1925 BOMBAY 287

SHAH, AG. C. J. AND KINCIAD, J.

Velchand Sawaji Marwadi—Plaintiff—Appellant.

v.

Sitaram Tukaram — Defendant—Respondent.

First Appeal No. 62 of 1923, Decided on 19th September, 1924, from the decision of the First Class Sub. J., Poona, in Suit No. 909 of 1921.

★ T. P. Act, S. 53—Hollow transaction—Section applies.

The mere fact that the transaction is hollow does not make it less a transfer of immoveable property within the meaning of S. 53 and if the conditions of that section are satisfied the document should be declared void against the creditors of the transferor. [P 207, C 1]

J. G. Rele—for Appellant.

V. D. Limaye—for Respondent.

Shah, Ag. C. J.—The plaintiffs in this case sued for a declaration that the sale-deed passed by defendant No. 1 to defendant No. 2 on January 4, 1921, was hollow and executed with the intention to defraud the plaintiffs and that therefore it was null and void. Plaintiff No. 1 had obtained a decree against defendant No. 1 in April 1921 and was a decree-holder against defendant No. 1 at the date of the suit. Plaintiff No. 2 was a creditor but had not obtained a decree. It appears from the evidence that the plaintiff stated that the suit was on behalf of all the creditors of defendant No. 1. Defendant No. 1 did not appear to contest the suit. Defendant No. 2 contended that he was a true and *bona fide* purchaser for value, and that the deed was not executed with intention to defraud the plaintiffs. The first issue framed was: "Is the sale-deed (Exhibit 17) dated January 4, 1921, exe-

cuted to defraud and delay the plaintiffs and other creditors of the defendant No. 1?" Though defendant No. 2 contended in the written statement that he was a *bona fide* purchaser for value, no issue appropriate to cover that plea was raised. But the second issue raised was: "Are the plaintiffs entitled to the declaration as sought for?" On the evidence the learned Judge found that there was no consideration for the sale and that it was a nominal deed passed by the defendant in favour of defendant No. 2 who was his brother-in-law and that defendant No. 2 was not in a position to buy the property of that value. The learned Judge found in fact that the whole transaction was not real but hollow. The learned Judge was of opinion that as the suit was under S. 53 of the Transfer of Property Act that finding would not avail the plaintiff in the suit and accordingly dismissed the suit.

The plaintiffs have appealed to this Court. It is urged in support of this appeal that the finding of fact recorded by the lower Court on evidence is correct and that in view of that finding it should be declared that the sale-deed is void as against the creditors of defendant No. 1. It is contended that in view of that finding the conditions necessary to invite the application of S. 53 are all satisfied, and that there is no reason why the suit should be defeated on such technical considerations as the lower Court has accepted. On behalf of the respondents, the original defendants, it is not disputed and it cannot be disputed on the evidence, that this transfer was effected by defendant No. 1 in favour of defendant No. 2 without any consideration. The mere fact that the plaintiffs succeeded in showing that it was really a hollow transaction does not prevent the Court from considering whether the conditions of S. 53 are satisfied. It is clear that the plaintiffs are the creditors of defendant No. 1 and the effect of this transfer is to prevent the property from being reached by creditors. If this document stands, the property would not be available to the creditors of defendant No. 1 and the effect of the transfer would be to defeat or delay the creditors of defendant No. 1. Though in the written statement a point was made that defendant No. 2 was a transferee in good faith and for consideration, there was no issue on that point raised in the

lower Court, and it is clear that there is no need for that issue because consideration cannot be proved. Having regard to the relationship between defendant No. 1 and defendant No. 2 and the circumstances under which the document came to be transferred, good faith also is out of question. The mere fact that the transaction is hollow does not make it less a transfer of immoveable property within the meaning of S. 53. We think, therefore, that the lower Court was wrong in dismissing the suit. We allow this appeal, reverse the decree of the trial Court and declare the document dated January 4, 1921, between defendant No. 1 and defendant No. 2 to be void as against the plaintiffs and other creditors of defendant No. 1.

Plaintiffs to have their costs throughout from the defendants.

Appeal allowed.

1925 BOMBAY 288

MACLEOD, C. J. AND CRUMP, J.

Ramchandra Hanmant Deshpande—
Defendant—Appellant.

v.

Kashinath Laxman Deshpande—Plaintiff—Respondent.

Appeal No. 69 of 1923, Decided on 11th November 1924, from the order of the Dt.J., Dharwar, in Appeal No 156 of 1921.

Evidence Act, S. 92—Sale by father as manager of joint Hindu family—Other members cannot dispute nature of transaction.

If a father as one of the joint owners sells, as representing all the other members joint with him, those other members must be treated as parties to the document. The other members of the joint family cannot dispute the transaction effected by the manager of the family on the ground that the transaction was really a different one from what it appears to be on the face of the document. [P 288 C 2]

R. A. Jahagirdar—for Appellant.

H. B. Gumaste—for Respondent.

Macleod, C. J.—The plaintiff filed this action in 1920 asking for a declaration that the sale-deed, Exhibit 27, was of the nature of a mortgage, and prayed that the amount due under it to the mortgagee might be ascertained. The document was passed on May 27, 1902, and even if the previous decision of this Court that agriculturists in this District were not entitled to take advantage of S. 10 A of the Dekkhan Agriculturists' Relief Act had been set aside since the case was

heard in the trial Court as Ss. 2 and 20 of the Act were only extended to this District from January 21, 1903, the plaintiff could not take advantage of that extension. After the suit was dismissed in the trial Court, the District Judge in appeal made an order that the suit should be remanded to the lower Court under Order XLI, rule 23, Civil Procedure Code, for trial on the other issues which had been framed.

Now in 1902 the plaintiff and his father were joint. The father had sold the property as manager of the joint family. It is not suggested in this case that the father was exceeding the powers he had as such manager. The real question is whether the son can dispute the transaction of his father by seeking to call evidence to show that the document, although on the face of it a sale, was in reality a mortgage. It was contended in both the lower Courts that the real question then was whether the plaintiff was a representative in interest of his father. If he was not, he could lead evidence and prove Exhibit 27 to be a mortgage under S. 99 of the Indian Evidence Act. The proper question to be considered was whether the plaintiff was a party to the document of 1902 so that he would be excluded from calling the evidence which he sought to adduce under S. 92 of the Indian Evidence Act. It is clear that if a father as one of the joint owners sells, as representing all the other members joint with him, those other members must be treated as parties to the document. Otherwise most disastrous results would follow if the members of a joint family were enabled to dispute the transaction effected by the manager of the family, not on the ground that the manager had no power to effect the transaction, but on the ground that the transaction was really a different one from what it appeared to be on the face of the document. That is the real point in dispute, and we are of opinion that as the plaintiff was joint with his father at the time of the transaction of 1902, clearly he must be considered as a party thereto, and he cannot, therefore, seek to show by calling oral evidence that the sale-deed was mortgage. The appeal, therefore, must be allowed and the decree of the trial Court restored with costs throughout.

Appeal accepted.

★ 1925 BOMBAY 289

MACLEOD, C. J. AND CRUMP, J.

Govindaprasad Lalitaprasad Mishra—
Defendant—Appellant.

v.

Rindabai Lalitaprasad—Plaintiff—Res-
pondent.First Appeal No. 12 of 1922. Decided on
20th November, 1924, from the decision
of the Sub. J. Dharwar, in Suit No. 137
of 1919.★ *Hindu Law—Adoption—Brahmins—Naisa-
gotra loi—Datta homam is essential.*The ceremony of *Datta homam* is essential to
validate an adoption amongst Brahmins unless
the adoptive father and the son belong to the
same gotra. [P 200 C 1]

A. G. Desai—for Appellant.

H. C. Coyajee and R. A. Jahagirdar —
for Respondent.

Judgment.—The plaintiff sued to ob-
tain a declaration that the first defend-
ant was not the legally adopted son of the
plaintiff's husband. The plaintiff disputed
the factum of the adoption. That issue
was found in the affirmative, but on the
issue whether the adoption was valid, the
Court held that the adoption was not
valid, though in fact it had been made,
because the adoptive father and the adopt-
ed son were of different *gotra*. Conse-
quently the *datta homam* was essential to
validate the adoption, and in this case it is
not disputed that the *datta homam* had
not been performed. If we were of opi-
nion that the adoption was valid, it would
have been necessary to consider the autho-
rities at some length. But we agree with
the judgment in the Court below that in
this particular case the *datta homam* was
necessary. The authorities are considered
in the latest Edition of Mayne at pp. 205-
208, and at the bottom of page 207 the
conclusion is as follows: "So far as it is
possible to reconcile these conflicting
decisions, they seem to point to the
conclusion that, among the twice-born
classes, the *datta homam* is necessary,
unless the adopted boy is of the same *gotra*
as his adopter, or unless a usage to the
contrary can be established." In *Maha-
shaya Shosinath Ghose v. Srimati Krish-
na Soondari Dasi* (1) their lordships ob-
served:—

"The mode of giving and taking a child
in adoption continues to stand on Hindu

(1) [1890] 6 Cal. 381=7 I.A. 250=7 C.L.J. 313
=4 Sar. 191 (P. C.)

law and Hindu usage, and it is perfectly
clear that amongst the twice-born classes
there could be no such adoption by deed,
because certain religious ceremonies, the
datta homam in particular, are in their
case requisite."

The question in issue in that appeal was
whether there could be in the case of
Sudras such a giving and taking as was
necessary to satisfy the law, by mere deed,
without an actual delivery of the child by
the father. Still this dictum of their lord-
ships may be taken as stating what their
lordships considered at that time was
necessary to validate an adoption amongst
the twice-born classes.

In this Presidency at any rate the only
cases in which an adoption has been re-
cognised as valid without *datta homam*
being performed have been those in which
the adoptive father and the adopted son
belonged to the same *gotra*. All the autho-
rities on this subject are discussed in
Valubai v. Govind Kashinath (2); and in
Bal Gangadhar Tilak v. Shrinivas Pandit
(3) their lordships in considering the same
question gave approval to the judgment of
Sir Lawrence Jenkins in that case. On a
review of the arguments in that judgment
it is obvious that the learned Chief Justice
considered that it was only because there
was identity of *gotra* that the *datta
homam* could be dispensed with. It must
be noted, however, that in referring to the
decision of the Full Bench of the Madras
High Court in *Govindayyar v. Doraswami*
(4), their Lordships in *Bal Gangadhar
Tilak v. Shrinivas Pandit* (3) considered
that decision as being of value as contain-
ing a careful study of the authorities and
affirming that the ceremony of *datta
homam* was not essential to a valid adop-
tion amongst Brahmins in Southern India.
With all due respect it would seem difficult
to find from the judgment of the Full
Bench that it was decided that the *datta
homam* was not essential to any adoption
amongst Brahmins. The head-note is as
follows:—

"The ceremony of *Datta homam* is not
essential to a valid adoption among Brah-
mans in Southern India, when the adop.

(2) [1899] 24 Bom. 218=1 Bom. L.R. 770.

(3) [1915] 39 Bom. 441=42 I.A. 135=17 Bom.
L.R. 527=13 A.L.J. 570=19 C.W.N. 729=
22 C.L.J. 1=29 M.L.J. 34=18 M.L.T. 1=
13 A.L.J. 570=19 C.W.N. 729=22 C.L.J.
1=29 M.L.J. 34=18 M.L.T. 1=29 I.C. 639
=2 L.W. 611=(1915) M.W.N. 484 (P.C.)

(4) [1887] 11 Mad. 5 (F.B.)

tive father and son belong to the same gotra."

Their Lordships considered whether they should depart from the decision in *V. Singamma v. Vinjamuri Venkatacharlu* (5). They pointed out that some doubt had been thrown upon that case by the observation of the Judicial Committee in *Mahashoya Shosinath Ghose v. Shrimathi Krishna Soondari Dasi* (1) that *datta homam* was requisite in the case of Brahmins and referred to the case of *Venkata v. Subhadra* (6) which was to the same effect. In *V. Singamma v. Vinjamuri Venkatacharlu* (5) the point was not argued on both sides and Jagannath, who was cited in the case, was no authority in southern India. Their Lordships concluded that the original texts conveyed the impression that *datta homam* might probably be an essential part of a valid adoption as a general rule and that in a proper case there was sufficient ground for directing an inquiry as to usage. Although the general rule might be as indicated above there was reason to think that there were exceptions to it. There was a text of Manu to the effect that if, among several brothers, one has a son, that son was the son of all. To this extent, that *datta homam* was not essential when the adoptive father and son were of the same gotra, they thought they might safely adhere to the decision in *V. Singamma v. Vinjamuri Venkatacharlu* (5).

The rule, therefore, may be stated in this form. The ceremony of *datta homam* is essential to validate an adoption amongst Brahmins unless the adoptive father and son belong to the same gotra. Apart from all the considerations there is this justification for it, that when it is sought to introduce a stranger into a family it is desirable that all the religious ceremonies should be performed so as to ensure the requisite publicity for the adoption. It may be said that there is a tendency in these days towards dispensing with religious ceremonies, but that is no reason why we should seek in this case to depart from what must be recognized as an established rule of Hindu law. The appeal is dismissed with costs.

Appeal dismissed.

1925 BOMBAY 290

MARTEN AND FAWCETT, JJ.

Amarsangji Indrasangji — Plaintiff—Appellant.

v.

Desai Umed—Defendant—Respondent.

S. A. Nos. 554, 634, 642 and 653 of 1922, Decided on 29th August 1924, from the decision of the Dt. J., Ahmedabad, in Appeals Nos. 78, 94, 81 and 98 of 1920.

Civil Pro. Code., O. 22, Rr. 2 and 3—Appeal decreed in ignorance of appellants' death — Decree is nullity—Only Court decreeing the appeal can deal with application under R. 9,

Where appellant died but the appeal was decreed in ignorance of his death it was held in second appeal that the decree was a nullity and the case was remanded to the Court decreeing the appeal to deal with an application for setting aside abatement and bringing his heirs on record. [P. 291, C. 2]

M. K. Thakore—for Appellant.

H. V. Divatia—for Respondent.

Marten, J.—As regards Second Appeals Nos. 554, 634, 642 and 653 of 1922 a rather curious technical position has arisen. In all these cases there was a sole defendant, and the judgment of the trial Court was against that sole defendant. In each of the four cases the sole defendant appealed, but before the appeals came on for hearing he in each case died. But in each case his legal advisers appear to have been unaware of the fact, and accordingly the appeal was allowed to be heard and decided in favour of the defendant inasmuch as the lower appellate Court was in ignorance of the fact that the defendant had in fact in the meanwhile died. So, too, the plaintiffs in each suit were apparently unaware of the fact, and they presented second appeals to this Court in these suits as well as in the remaining twenty-nine companion suits. We have since heard and dismissed the plaintiffs' appeals in these twenty-nine companion suits.

We are now asked by the plaintiffs to say that the judgment of the lower appellate Court in the above four suits cannot stand, inasmuch as in fact the suit or the appeal had abated before the appeal was heard. Mr. Coyajee as *amicus curie* has been good enough to refer us to certain sections of the Code, and has also pointed out that the course taken in the trial Court was this, as stated by the trial Judge:—

"The plaintiffs in this suit and suits Nos. 289 to 295 and 297 to 321 are the

(5) [1868] 4 M.H.C. 165.

(6) [1884] 7 Mad. 548.

same, and the defendants in all the suits who are descendants of the original cultivators have common contentions and so the parties have put in purshis that evidence should be led in this suit and it is to guide all the other suits. The Court has therefore, put in copies of the findings and reasons of Suit No 288 in all the other suits.

It was accordingly suggested to us that that order in effect amounted to a consolidation order, and therefore under Order 41, rule 4, it was open to any of the defendants to appeal, and that on such appeal the appellate Court might reverse or vary the decree in favour of all the plaintiffs or defendants as the case might be. Alternatively under Order 41, rule 38, there is also a power for the appellate Court to discharge an order of the Court below in its entirety, notwithstanding that only some of the defendants may have appealed. But in my judgment both rules 4 and 38 of this Order only apply to "a suit", and therefore it is essential for its application that the thirty-three suits in the present case should be regarded as consolidated. In the view I take, it is perfectly clear here that no consolidation order was made. So far from there being any real consolidation, there appear to have been separate decrees passed in each of these thirty-three suits. Accordingly those Orders do not, I think, help us here.

Nor I think is S. 107 of the Code of any assistance except that it enables us to remand a case in certain instances. No doubt under sub-S. (2) we have the same powers and can perform, as nearly as may be, the same duties as are conferred by the Code on Courts of original jurisdiction in respect of suits instituted therein. But these powers and duties are all subject to such conditions and limitation as may be "prescribed," viz., in the Rules in the Schedule subject to authorised variations. In the present case I think it is clear that we have no power to set aside the abatement and to add the legal representative of the deceased defendant. The proper Court to deal with any application to excuse the delay and to set aside the abatement, under Order 22, rules 9 (2) and 11 and to add the legal representative under Order 22, rules 4 and 11 is, I think, the lower Court. In the events which have happened, the lower appellate Court had really no jurisdiction to hear the appeals as there was no appellant before it.

Accordingly the order which I would

suggest is that the decree of the lower appellate Court in each of these four appeals be set aside, and that in each case the appeal to the lower appellate Court from the trial Court be remanded to be dealt with by the lower appellate Court according to law. We will similarly direct that the four Civil Applications Nos 639 to 642 of 1924 which are made to us by the respective heirs of these four deceased defendants to continue the proceedings be presented to the lower appellate Court to be dealt with by that Court. In considering those applications my personal view is that the lower appellate Court may fairly take into consideration the exceptional circumstances of this case, viz., that there were thirty-three suits in which the points at issue were all substantially the same. Accordingly it is a class of litigation in which a slip as to whether one of the thirty-three parties was alive or dead might easily be made. Nor do I altogether understand why the cheaper, and as it seems to me the more convenient, procedure was not adopted, viz., after the original decree had been passed, to take one or say two appeals as test appeals, and to stay the remaining appeals pending the ultimate decision of the test appeals. The course actually taken has involved the maximum of expense and the minimum of use to the unfortunate litigants in the present suits.

As regards the costs of the plaintiffs, we think that their costs up to date in the lower appellate Court and in this Court should be costs in the respective appeals to the lower appellate Court, and should be dealt with by the lower appellate Court accordingly. In the result these costs will eventually depend on what decision the lower appellate Court may arrive at as to admitting the applications of the heirs of the several defendants to continue the proceedings.

There was one other appeal, viz., Appeal No. 553 of 1922, in which the same contention was raised by the plaintiffs. But there there were two defendants and not one, and accordingly it is conceded that the point as to abatement does not arise. Therefore as regards Appeal No. 553 of 1922 it will be dismissed with costs just as in the case of the other twenty-eight appeals.

Fawcett, J.—I agree.

Appeals remanded.

★ **1925 BOMBAY 292**

SHAH, AG. C. J. AND KINCAID, J.

Hanmant Gurunath Kulkarni—Defendant—Appellant.

v.

Ramappa Lagamappa Ilager—Plaintiff—Respondent.

Second Appeal No. 429 of 1923, Decided on 29th September, 1924, from the decision of the Asst. J. Dharwar, in Appeal No. 158 of 1920.

★ *Limitation Act, Art. 44—Ward transferring the property—Transferee and ward suing within 3 years of ward's majority to set aside alienation by ward's guardian—Suit is not barred.*

The remedy contemplated by Art. 44 is open to a ward for three years from the date of his attaining majority, and that remedy is not lost, by the mere fact that he purports to transfer his interest in the property such as it is at the date of the transfer, to a third party. [P 294, C 1]

Where a minor's property was sold by the minor's guardian and the minor after attaining age transferred the same property to another and where the transferee as the principal plaintiff and the transferor as the second plaintiff sued to set aside the sale within three years of the minor attaining majority.

Held: that the suit was not barred by limitation. [P 294, C 2]

R. A. Jahagirdar—for Appellant.*G. P. Murdeshwar*—for Respondent.

Shah, Ag. C. J.—The facts which have given rise to this second appeal are these. The property in suit belonged to plaintiff No. 2 while he was a minor. His mother, as his natural guardian, sold it to defendant No. 1 for Rs. 700 on May 15, 1905. The defendant No. 1 obtained possession. On April 2, 1909 he sold the property to defendant No. 2, and defendant No. 2 has been in possession since then. Plaintiff No. 2 attained majority on April 11, 1916, and he conveyed his interest in these lands, with another land to plaintiff No. 1 for Rs. 1,500 on September 13, 1916. The present suit was filed on December 20, 1918, by plaintiff No. 1, who purchased the interest of plaintiff No. 2, to set aside the alienation made by the mother of plaintiff No. 2 during his minority, and for possession and mesne profits.

The defendant No. 1 pleaded that the sale by the guardian of plaintiff No. 2 was for necessity, and that the plaintiff's claim was time-barred. Defendant No. 2 raised the same pleas.

The trial Court found that the alienation by plaintiff No. 2's mother to defendant No. 1 was not for necessity. In dealing with the question relating to the alienation by the guardian during the minority of plaintiff No. 2, the Court observed that the alienation was not binding on plaintiff No. 2, and must be set aside.

As regards limitation, apparently the point was first given up, but ultimately it was taken at the close of the case, and the trial Court allowed that point to be taken. On that question the trial Court found that the cause of action arose on the minor's attaining majority, and that any suit to set aside the transfer could be brought within three years from that date. The Court was of opinion that S. 6 of the Indian Limitation Act did not apply to such a case, and held the suit to be within time. Instead, however, of setting aside the sale formally, the Court passed a decree in favour of plaintiff No. 1 for possession and mesne profits. He dismissed the suit as regards plaintiff No. 2.

Defendant No. 2 appealed against plaintiff No. 1 only. Plaintiff No. 2 was not joined as a party-respondent to the appeal. The same two questions were raised before the Court of appeal as to limitation, and as to necessity for the alienation by the mother of plaintiff No. 2. The learned Assistant Judge, who heard the appeal, found that the sale by the mother was not for legal necessity, and that it was not binding on plaintiff No. 2. The learned Judge was further of opinion that the claim was not barred as the cause of action accrued to the minor only on his attaining majority, and that as the case was governed by Art. 44 of the Indian Limitation Act, the suit was not barred. The decree of the trial Court was confirmed.

Defendant No. 2 has appealed to this Court against plaintiff No. 1 only. In the appeal the finding that there was no necessity for the sale by the guardian and that it was not binding upon plaintiff No. 2, is not challenged.

The only point urged in support of the appeal is that the claim of plaintiff No. 1 is time-barred. It is urged that the suit is dismissed as regards plaintiff No. 2, and as regards plaintiff No. 1 the cause of action really accrued on the date of the alienation; that Art. 44 of the Indian Limitation Act cannot apply to an

assignee from the minor who has attained majority, and the claim not having been filed within twelve years from the date of the alienation, so far as plaintiff No. 1 is concerned, the claim is time-barred. In support of this contention reliance is placed upon the *ratio decidendi* in *Doraisami Serumidan v. Nondisami Saluvan* (1). On the analogy of the view taken in *Rudra Kant Surma Sircar v. Nobo Kishore Surma Biswas* (2), *Mahadev v. Babhi* (3) and *Rangaswami Chetti v. Thangaoelu Chetti* (4), that an assignee of a minor's interest cannot get the benefit of S. 6 of the Indian Limitation Act, it is urged that the assignee of plaintiff No. 2's interest cannot get the benefit of Art. 44 of the Indian Limitation Act.

On the other hand, it is urged that whatever may be the difficulty in the way of plaintiff No. 1 claiming possession after setting aside the sale, as plaintiff No. 2 joined him in the suit, and as plaintiff No. 2 had clearly a right under Art. 44 within three years from the date of attaining majority to have the sale set aside, there is no reason why the claim should be treated as time-barred. It is also pointed out that the relief as to setting aside the sale should have been granted to both the plaintiffs by the trial Court and that possession might have been allowed to plaintiff No. 1 in virtue of the sale-deed in his favour. It is urged that if the decree had been in that form, it could not have been suggested that the claim was time-barred. But as the decree passed in substance is to that effect, there is really no scope for the plea of limitation. It is further urged that S. 6 of the Indian Limitation Act has nothing to do with the present case, that Art. 44 is a special article which gives to a ward on his attaining majority the right to sue to set aside the sale within three years from the date of his attaining majority, and that though the cause of action for setting aside the sale may arise from the date of the alienation, the particular remedy open to the ward, who has attained majority, contemplated by Art. 44, is open to him for three years from the date of his attaining majority. It is not disputed

before us by the learned pleader for respondent that if the suit had been filed by plaintiff No. 1 alone, Art. 44 would not apply to that suit, and he would have to show that his right to set aside the alienation was within time according to the law of limitation apart from that article, i. e., within twelve years from the date of the alienation.

On a consideration of the arguments, it seems to me that on the facts of the case, the claim made by the plaintiff is not time-barred. It is clear under Art. 44 that a ward, who has attained majority, can sue to set aside a transfer of property by his guardian within three years from the date of his attaining majority. In fact it has been held by a Full Bench in *Fakirappa v. Lumanna* (5) that "a Hindu minor on his attaining majority cannot sue to recover possession of property transferred by his mother acting as his natural guardian during his minority without suing to set aside the transfer within the period of limitation provided by Art. 44 of the Indian Limitation Act." Therefore, if the alienation by the mother was to be set aside, the ward had to sue under Art. 44 within three years to set aside the sale. He has in fact done so, and it is difficult to see how the claim made for setting aside the sale can be said to be time barred, so far as he is concerned. The fact that he conveyed his interest in the property to plaintiff No. 1, before he filed the suit, does not mean, in our opinion, that he has no interest in maintaining the suit to set aside the alienation. It would be difficult to apply this Art. 44 to the case of a transferee from the ward. We are not by any means clear that Art. 44 would apply to a suit filed by a transferee from the ward. It is, however, not necessary on the facts of this case to decide the question. It is enough to point out the difficulty of applying Art. 44 to a simple suit by a transferee of the ward. The article refers to a suit by a ward who has attained majority. Assuming, without deciding, that Art. 44 would not apply to a suit by a transferee, it does not follow that where the ward joins with the transferee in suing to set aside the sale, the ward cannot do so, if the suit is brought within three years from the date of his attaining majority. We do not say that the cause of action in the case of

(1) [1912] 38 Mad. 118—25 M. L. J. 405—21 I. C. 410—14 M. L. T. 401.

(2) [1883] 9 Cal. 668—12 O. L. R. 239 (F.B.)

(3) [1902] 26 Bom. 730—4 Bom. L. R. 413.

(4) [1919] 42 Mad. 637—(1919) M. W. N. 448—50 I. C. 330—10 M. L. W. 333—26 M. L. T. 147.

(5) [1919] 14 Bom. 742=53 I.C., 257=22 Bom. L.R. 680.

suit under Art. 44 by a ward arises on his attaining majority. The cause of action for setting aside an improper alienation by the guardian of a minor arises from the date of the alienation. But the remedy contemplated by Art. 44 is open to a ward for three years from the date of his attaining majority, and that remedy is not lost, in our opinion, by the mere fact that he purports to transfer his interest in the property, such as it is at the date of the transfer to a third party. At the date of the transfer by plaintiff No. 2, he had a right to sue to set aside the sale. Until it was set aside, the sale was good, so far as he was concerned, and his interest in the property was subject to the result of a suit. In order to make his transfer to a third party effective where the transfer is effected, as in this case, at a time when the claim of the transferee as such for possession was time-barred, he had to sue to set aside the sale, and to establish his title to the property by showing that the sale was not binding upon him. We see no objection on principle to the ward joining in a suit to set aside the sale, though as a result of setting aside the sale the property would go to his transferee. Though in one sense the benefit goes to the transferee, the transferor gets the full benefit by way of consideration for the transfer of the property. If the right of plaintiff No. 2 at the date of transfer to plaintiff No. 1 be held to be a mere right to sue, it cannot be transferred under S. 6 (e) of the Transfer of Property Act: and his right to sue would continue in spite of the transfer.

S. 6 of the Indian Limitation Act has nothing to do with this case, and we do not think that the cases relating to S. 6 can help us in deciding the point that arises here. The analogy of S. 6, relied upon by the learned pleader for the appellant, cannot be applied against the plain meaning of the Article and it hardly applies to the facts of the present case.

No doubt it may be said in this case that the suit is substantially by the transferee, and that plaintiff No. 2 is joined only to save limitation, even though he had no interest in the suit. We agree that plaintiff No. 2 is joined to save limitation, but we are of opinion that it is open to the parties to save limitation by adopting that course in view of the provisions of Art. 44. We are satisfied that the plaintiff No. 2 was entitled to sue to

set aside the sale in spite of the transfer in favour of plaintiff No. 1. Though the point is not wholly free from difficulty, after giving the best consideration to the arguments on either side, we have come to the conclusion that, on the facts of this case, the claim is not barred.

It may be that it was not strictly correct for the trial Court to dismiss the suit as to plaintiff No. 2. But in substance the sale is set aside and the possession ordered to be given to plaintiff No. 1, who is undoubtedly entitled to possession, if the sale can be set aside.

The decree appealed from is substantially right. We confirm it and dismiss the appeal with costs.

Appeal dismissed.

1925 BOMBAY 294

MARTEN AND FAWCETT, JJ.

Amarsangji Indrasangji and another—
Plaintiffs—Appellants.

v.

Ranchhod Jethabhai and others—
Defendants—Respondents.

Second Appeal No. 553 of 1922, Decided on 28th August 1924, from the decision of the Dt. J., Ahmedabad, in Appeal No. 77 of 1920.

(a) *Bombay Land Revenue Code (V of 1879) S. 83—Tenancy traceable to the time of foundation of village in particular year—Origin of tenancy may yet be shown to be indefinite.*

Where once a definite commencement of a tenancy is found then there is no room for the presumption to be raised under S. 83. But it does not follow that because the defendants trace their origin and connection with the land back to the foundation of the village in a particular year their particular tenancy or that of their ancestors began on that particular definite date. The defendants can show by means of other evidence that they had been tenants of the lands prior to that date, from some period which cannot be definitely fixed. [P. 296, C. 1, 2]

(b) *Words — Maleki does not necessarily mean ownership.*

The word Malek or maleki is often used in a sense which cannot on investigation justify the suggestion of an absolute owner or ownership in law. In the present case the term was held to have been used in the sense of permanent tenancy. [P. 297, C. 1]

(c) *Bombay Land Revenue Code (V of 1879) S. 84—10 days' notice is invalid.*

The words of the particular notice given by the plaintiffs were:—"You are hereby given notice that within ten days from the date of

receipt hereof you should pay over to us rent of the last year and you should give in writing a kabuliyat to pay rent for the lands you cultivate, failing which you should hand over to us the lands which you cultivate, and in default steps will be taken against you to take over possession from you or obtain any other remedy according to law".

Held; that it cannot be implied that the notice to quit was to quit at the termination of the cultivating season and that it did not comply with S. 84. [P 297 C 2]

Held; further that though the form of Notice referred to in S. 84 was not imperative, it still indicates the class of notice which the Indian legislature had in mind, and that notice would be very much what would be required under English Law and the notice in the present case was not a valid notice to quit. [P 298 C 1]

(d) *Evidence Act, S. 115—Non-production of evidence raises adverse presumption.*

The non-production by the plaintiffs, of all the books which they could be expected to produce, raises adverse presumption against them.

[P 299 C 1]

G. N. Thakor and M. K. Thakore—for Appellants.

H. C. Coyajee and H. V. Divatia—for Respondents.

Marten, J.—These are some thirty-three appeals from the judgment of the District Judge of Ahmedabad reversing the decision of the Subordinate Judge and dismissing the plaintiffs' suits with costs. The suits all raise the same point. They are brought by the plaintiffs as the Thakors of Mohoghar claiming that they hold in joint ownership the wanta of the village of Mehmadpura. This wanta consists in all of 104 acres, of which 94 acres are in dispute in this and the companion suits, so the learned District Judge tells us. The principal point in dispute is as to whether the defendants are annual tenants as the plaintiffs contend, or whether they are permanent tenants as the defendants contend. There is a subsidiary point as to whether, even if the defendants are annual tenants, the plaintiffs are entitled to enhance the rent. It appears that by an alleged notice to quit, dated February 5, 1916, the plaintiffs called on the defendants to pay an increased rent and to sign a writing to that effect, and that in default they were to give up possession. This was to be done within ten days. The defendants replied repudiating the right of the plaintiffs to give this notice and claiming that they were permanent tenants. Consequently in the same year 1916, Suit No. 136 of 1916 was brought by the plaintiffs but was subsequently withdrawn with permission to bring another suit. There-

after, namely, on November 26, 1918, this present Suit No. 288 of 1918 and its companion suits were brought.

Now in this case we have the advantage of a particularly clear judgment of the learned District Judge, which relieves me from the necessity of setting out the facts or the reasons for our judgment in any great detail. The case largely turns upon S. 83 of the Bombay Land Revenue Code, which provides that:—

"Where, by reason of the antiquity of a tenancy, no satisfactory evidence of its commencement is forthcoming, and there is not any such evidence of the period of its intended duration, if any, agreed upon between the landlord and tenant or those under whom they respectively claim title, or any usage of the locality as to duration of such tenancy, it shall, as against the immediate landlord of the tenant, be presumed to be co-extensive with the duration of the tenure of such landlord and of those who derive title under him."

The defendants' case is that this village of Mehmadpura was founded about 1655 A. D. and they trace their connection with this village back to that date. It would appear that the first appearance of the defendants' names or their ancestors in the plaintiffs' books is in 1876. But it would also appear from some of the earlier books produced by the parties that prior to that date, *viz.*, in 1869, the defendants' names or those of their predecessors appear amongst the patils who were then cultivating this land according to the plaintiffs' accounts. What the learned District Judge says is this: "This statement of the defendants derives corroboration from the fact that in the account books for the previous years commencing from the Samvat year 1905 produced by the plaintiffs, the lands are shown as being cultivated by Patel samasth, *i.e.*, body of Patels, without mentioning individual names."

Following that out when one turns to certain accounts produced by the defendants, that shows how these patels dealt with the produce of the rent or the produce of the land, and the defendants' ancestors are shown in that account as getting a share of these rents. So that takes us back a little earlier, *viz.*, to 1869. And there is one further point, *viz.*, that the lower appellate Court has found that the plaintiffs have not produced all the books which one would expect them to produce.

Then comes the question of the rent or salami or giras, whatever may be the true expression. The finding of the lower appellate Court is: "In the present case I think the evidence taken as a whole leads to the conclusion that the defendants have been paying rent at a uniform rate." Then lower down the same judgment runs: "Taking the evidence as a whole, I think the reasonable conclusion is that the defendants have been paying a uniform rate of rent to the plaintiffs." Then so far as the evidence of the plaintiffs is concerned, the learned District Judge summarizes on page 4 the evidence of the plaintiffs themselves. Shortly stated, they said they did not know when the ancestors of the defendants were let into possession or on what terms. As regards the plaintiffs' Karbhari, Exhibit 104, he states that so far as his knowledge goes, the defendants have been paying a fixed rent, but he knows nothing about the origin of the tenancy or about the quantum of rent. He only repeats the report that he has heard that certain Mahomedan cultivators were in possession of the land to a certain date.

After a consideration then of the whole facts of the case, the learned District Judge came to the conclusion that the facts fell within S. 83 of the Bombay Land Revenue Code, and that the Court was entitled to presume this tenancy to be a permanent tenancy. It has been argued before us strenuously by the appellants that this was an error of law on the part of the District Judge inasmuch as the defendants' own case stated what the commencement of the tenancy was; and that on the rulings of this Court where once you find a definite commencement of a tenancy, then there is no room for the presumption to be raised under S. 83. As far as the authorities of this Court are concerned they are naturally binding on us, and one can quite understand that if you find a definite and recent date when an actual tenancy began, it would be wrong in such a case to raise a presumption under S. 83. Similarly, under English law, my brother Fawcett has in *Narayan v. Pindurang* (1) pointed out that in England a plea based on immemorial custom might be defeated by proof that it began within legal memory, viz., after 1189 (see Halsbury,

Vol. X, p. 283) and the same might apply as regards certain claims based on prescription at common law. (See Halsbury, Vol. XI, pp. 260-61).

But, on the facts of this particular case, I entirely agree with the learned District Judge that the commencement of this tenancy is not definitely shown. No doubt the witnesses have put forward the origin of it to the foundation of the village. But, if one follows that argument out, one might say that a tenancy in a particular case must have begun by, say, the year 1200 in a particular town because one knows that prior to that date no such town or village existed whatever. It seems to me that it does not follow that because the defendants trace their origin and connection with this land back to the foundation of the village, that it necessarily follows that their particular tenancy or that of their ancestors began on that particular definite date. On the contrary when one goes back, as in the present case, to such a distant date as over 250 years ago, one certainly gets the antiquity contemplated by S. 83. And I think on the facts of the present case there is quite enough uncertainty as to the commencement of the tenancy, and also as to its terms, to justify the presumption under S. 83.

Nor can I accept the argument that was put forward in the alternative, viz., that if you do not fix the commencement of the tenancy definitely at the foundation of the village, then no commencement of the tenancy is shown before 1876 or some such time. That would be to neglect amongst other things the oral evidence of the defendants as to the possession of this land by themselves or their ancestors. It would also be to ignore the admissions of the plaintiffs themselves that they are unable to account for the original possession of this land by the defendants and their ancestors. In other words we get exactly a class of case where the origin of a particular right of an occupier or tenant is lost in antiquity.

That being so, in my judgment the lower appellate Court arrived at the right conclusion on the question whether the defendants were annual tenants or permanent tenants, and that the finding that they were permanent tenants ought to be upheld.

(1) 1922 Bom. 402 = 17 Bom. 4 = 24 Bom. L.R. 831.

Then a point was taken that, even if they were permanent tenants, they denied their landlords' title, and therefore that involved forfeiture. This is based on what in my opinion is a very narrow construction of the written statement of the defendants. There they pleaded first of all that they were old and permanent cultivators, that they were not tenants at will or annual tenants of the plaintiffs, but that they cultivated the land under the right of ownership or permanent tenancy since the time the village of Me:nadpura was founded, and they had been paying to the plaintiffs a fixed Salami from the time of their ancestors.

As regards the word translated 'ownership' the word used in the vernacular is maleki. And one knows from other cases that the word Malek or Maleki is often used in a sense which certainly cannot on investigation justify the suggestion of an absolute owner or ownership in law. I am satisfied that the real case put forward by the defendants was that they were permanent tenants, and that they never denied that the plaintiffs were their landlords. Nor is there anything in the issues raised in the trial Court to suggest anything of the sort. The main issues were issues Nos. 8 and 9. The one raised a point whether the plaintiffs proved a tenancy from year to year. Issue No. 9 raised a question whether the defendants were permanent tenants of the disputed land. One may also say that where you find permanent tenants at what has been found to be here a uniform rent, their position after all does not differ very greatly from that of owners. Even an owner in fee simple who is liable to pay a certain fixed fee farm or quit rent in one sense is not an absolute owner of the land, because he has to pay this particular annual sum. But in the ordinary acceptation of the word, he undoubtedly would be looked upon as an owner not only by laymen but also by lawyers.

Then the next question is as to the validity of the notice to quit given by the plaintiffs. That point in the view I take it is unnecessary to decide, because I hold that the defendants were permanent tenants. But supposing they were annual tenants, then it is conceded that a notice to quit had to be given under S. 84 of the Bombay Land Revenue Code which runs: "An annual tenancy shall in

the absence of any special agreement in writing to the contrary require for its termination a notice given in writing by the landlord to the tenant, or by the tenant to the landlord, at least three months before the end of the year of tenancy - at the end of which it is intimated that the tenancy is to cease. Such notice may be in the form of Schedule E, or to the like effect." If one turns to Schedule E it will be found that this notice may be in the following form: "I do hereby give you notice that I do intend to enter upon, and take possession of the land which you now hold as tenant under me, and you are therefore required to quit and deliver up possession of the same at the end of this current year, terminating on the.....day of....." I should here mention that an earlier part of S. 84 enacts that "An annual tenancy shall, in the absence of proof to the contrary, be presumed to run from the end of one cultivating season to the end of the next. The cultivating season may be presumed to end on March 31."

Now the words of the particular notice given by the plaintiffs were:—

"You are hereby given notice that within ten days from the date of receipt hereof you should pay over to us rent of the last year and you should give in writing a kabuliyat to pay rent for the lands you cultivate, failing which you should hand over to us the lands which you cultivate and in default steps will be taken against you to take over possession from you or obtain any other remedy according to law."

I agree with the learned District Judge that on the true construction of this notice the defendants were required either to pay the arrears of rent or pass a lease within ten days or in default to hand over possession on the expiry of ten days. That being so, the period of three months required under S. 84 was not given. For, I cannot accept the construction which is advanced by the defendants to the effect that we should imply that this notice to quit was to quit at the termination of the cultivating season.

It is unnecessary to refer to English authorities to show the strictness with which notices to quit are there construed, and I do not say that the same rules would necessarily apply in India. But here we have a definite section to guide

us, and a definite form of notice, which, though not imperative, still indicates the class of notice which the Indian legislature had in mind, and that notice would be very much what would be required under English law. After all it is a matter of common sense that if a landlord requires a tenant to go out of possession at a particular date, the specific date on which the tenant is required to quit the property should be given, otherwise the tenant would be left in a state of embarrassing uncertainty as to what arrangements he should make for his future home and for the removal of his furniture and other matters, or else in default of complying with some ambiguous notice he might be exposed to the nuisance and annoyance of a law suit.

In my judgment, therefore, the judgment of the lower appellate Court was correct on this point also, *viz.*, that the plaintiffs did not give a valid notice to quit and that in the absence of such a notice the plaintiffs were not entitled to maintain this suit.

Then it was said that apart from that point and even supposing that the defendants were permanent tenants, even then the plaintiffs were entitled to enhance the rent. In this connection it will be remembered that in their pleadings the plaintiffs claimed back rent and possession of the land, and a declaration that they were entitled to increase the amount of rent at their pleasure. No doubt the exception to S. 83 provides that "Nothing contained in this section shall affect the right of the landlord (if he have the same by virtue of agreement, usage or otherwise) to enhance the rent payable, or services renderable by the tenant or to evict the tenant for non-payment of the rent or non-rendition of the services, either respectively originally fixed or duly enhanced as aforesaid." But here no agreement whatever is proved under which the plaintiffs had any right to enhance the rent, and as regards the usage or otherwise I can only say that I agree with the learned District Judge, when he says there is no issue framed to that effect and no evidence led, and that therefore there are no materials before the Court which would justify an appellate Court in approaching the case from that stand-point. When the learned District Judge says this, it must be remembered that he had already considered earlier in his judgment the

question whether the defendants' story that they had paid a uniform rent was true, or whether the plaintiff's case that the rent had varied was the correct one. As I have already said the learned Judge in at least two passages stated that he had come to the conclusion that the defendants' case that they had paid a uniform rent was the correct one. Consequently it cannot fairly be urged on behalf of the plaintiffs that one should accept the plaintiffs' evidence, *viz.*, that the rent was enhanced, or that a higher rent was paid at certain dates compared with others, and that that accordingly implied the power of the landlord to enhance the rent, and therefore there was evidence to support the alleged usage, and that as regards this particular land the landlord has the right to enhance the rent. Nor is it fair to the learned District Judge to say that in considering this point about enhanced rent, he did not take into consideration the evidence on the question of rent. He had already done that in the earlier part of his judgment. He had there found that the plaintiff's had failed to make out their case on the point of fact as to the alleged varying rent. Consequently when he came to this final issue, the existing findings were of a long tenancy by the defendants at a uniform rent. Consequently on that finding as to the uniformity of the rent, there was no evidence on which you could infer that the landlord had either expressly or by implication a right to enhance the rent.

Then it was said the real point in this case was whether the defendants were annual tenants, and that if in fact they were permanent tenants, then we ought to leave open for decision in some future case the question whether the plaintiffs are still entitled to raise the rent, or alternatively we should remand this case back to the lower Court for further findings and further evidence. But this case began six years ago. The plaintiffs' plaint, as I have already indicated, stated in the clearest terms that they were entitled to increase the amount of the rent at their pleasure. It is clear that they could have based their claim alternatively, *viz.*, that if the defendants were annual tenants, as the plaintiffs claimed, that the plaintiffs were entitled to increase the rent, or to evict them for non-payment, or that if alternatively the defendants were permanent tenants, the plaintiffs had

practically the same rights. In other words, it was open to the plaintiffs to prove if they could by proper evidence that whichever was the true legal position as regards the tenancy of the defendants, the plaintiffs were still entitled to enhance the rent, and if necessary to give a notice to quit in default of payment.

Under these circumstances I think the learned District Judge rightly decided the appellate issue No. 6 against the plaintiffs. I also think that we should be entirely wrong if we either remanded this issue for further evidence or left the point open for decision in some other case. In my judgment the decision of the lower appellate Court dismissing the plaintiffs' suit with costs was correct. It follows that in my judgment this appeal should also be dismissed with costs, and that the other companion appeals should also be dismissed with costs, but all this is subject, as regards four of the companion appeals, to a technical point arising from the death of a sole defendant as to which we will hear the arguments later on.

Fawcett, J.—I agree generally with the judgment of my learned brother on the main question whether the defendants are permanent tenants. I think there is certainly no ground for interference with the decree of the lower Court in second appeal. There is evidence which definitely traces back the tenancy to the year 1876, and although the accounts for the preceding year that are produced by the plaintiffs do not give the actual names of the cultivators, yet they show that the land was cultivated by certain patels, who, in view of Exhibit 45 and similar Exhibits appear to include ancestors of the defendants. These accounts go back to the Samvat Year 1905 (A. D. 1848-49). Under the circumstances I think an inference arises that in that particular year the defendants' ancestors were cultivating this land and were tenants of the plaintiffs' ancestors. Stress has, I think, been rightly laid by the learned District Judge on the fact that the plaintiffs, who employ Karbharis and keep regular books, have not produced their accounts for previous years, and I entirely agree with him that a strong inference arises that, if they had produced those books, they would not have been in favour of the plaintiffs' case. In these circumstances there is satisfactory evidence that the defendants' ancestors were

tenants of the plaintiffs' ancestors even prior to the year 1848, and the origin of this tenancy is lost in the mist of antiquity. I also agree with the learned District Judge and my learned brother that the mere fact that the defendants state that the tenancy began with the foundation of the village in Samvat Year 1712 is not a conclusive statement of the origin of tenancy, which would bar the operation of S. 83 of the Bombay Land Revenue Code. It is obviously a statement based on mere speculation or legend and is not "satisfactory evidence" of the kind contemplated by S. 83. I also agree that the plaintiffs have not adduced any evidence in this suit, sufficing to show they are entitled to enhance the rent of the defendants on the basis of the defendants being permanent tenants. I concur, therefore, in the order proposed by my learned brother.

Appeal dismissed.

1925 BOMBAY 299

SHAH, AG. C. J. AND KINCAID, J.

Makkama Khadirsahab — Defendant—Appellant.

v.

Masabi Abasali—Plaintiff—Respondent.

Second Appeal No. 514 of 1923, Decided on 19th September, 1924, from the Decision of the Asst. J., Bijapur, in Appeal No. 93 of 1922.

T. P. Act, S. 41—Property transferred by Mahomedan husband to his wife as Mahr.—Husband remaining ostensibly as owner—Transfer of same property to daughter-in-law as Mahr is operative.

A Mahomedan daughter-in-law who accepts a transfer of certain property in lieu of Mahr from her father-in-law who assures her that he is the owner of the property and in whose name and possession the property stands at the date, is protected, notwithstanding that as a matter of fact the property had previously been conferred on the transferor's wife as her Mahr.

G. R. Madbhavi—for Appellant.

H. B. Gumaste—for Respondent.

Shah, Ag. C. J.—The plaintiff in this case sued to recover possession of certain property consisting of one survey number and house. She based her claim upon a Mahrnamah which was passed by defendant No. 1 and his son in her favour. The plaintiff is the daughter-in-law of defendant No. 1. And defendant No. 2 is the

wife of defendant No. 1. The defence of defendant No. 2 was that these two properties were given to her along with the rest of the property by defendant No. 1 by way of Mahr in 1908. The Mahrnamah in favour of the plaintiff was made in 1916. Defendant No. 2 claimed these properties as her property and resisted the plaintiff's claim. The trial Court was satisfied that defendant No. 1 had given the plaintiff property in Mahr to defendant No. 2 before it was given to the plaintiff; but it was of opinion that it was not valid and operative in law. Accordingly the plaintiff's claim was decreed against the defendants.

Defendant No. 2 appealed to the District Court, and the learned Assistant Judge, who heard the appeal, accepted the finding that in 1908 the property in suit was given by way of Mahr to defendant No. 2 by defendant No. 1. But there was no writing about it and the land and the house continued ostensibly in the name of defendant No. 1 and in his possession as before. The Assistant Judge was of opinion that in 1916 this particular property was given by way of Mahr to the plaintiff; and that shortly after defendant No. 1 gave possession of other land to defendant No. 2 in lieu of her dower. The learned Judge was further of opinion that in any case the defendants were estopped from contesting the plaintiff's claim under the Mahrnamah in her favour. Accordingly the appeal was dismissed and the decree of the trial Court was confirmed.

Defendant No. 2 has now appealed to this Court. It is argued on her behalf that as the property in suit was given to her by way of Mahr in 1908, the title to that property is with her. It is further argued that no document in writing evidencing the giving of the land by way of Mahr is required according to law, and that in 1916 defendant No. 1, who purported to give the property in suit to the plaintiff by way of Mahr, had no title to it. On the other hand it is argued that the Mahr, given to defendant No. 2 in 1908, was really a fictitious Mahr, that what was given to her in 1916 was the real dower, and that defendant No. 2 had no title to this property at the date of the transfer in favour of the plaintiff. Further it is argued that defendant No. 1 transferred this property to the plaintiff on the express understanding that the property belonged to him, that it was in his enjoy-

ment and that he had every right to give it by way of Mahr to her, and that the defendants are now estopped from contesting the plaintiff's claim. In fact the grounds taken by the lower appellate Court are relied upon by the learned pleader for the respondent in support of the decree.

It is difficult to say that defendant No. 2 did not get this property in suit as Mahr in 1908. It has not been shown in the argument before us that the transfer by way of Mahr can take place only by a registered document. We, however, do not consider it necessary to decide this point. All that we desire to say is that apart from the ground to which I shall presently refer, it may not be easy to support the view taken by the lower appellate Court. If these properties were promised by the husband as Mahr to defendant No. 2 it is clear that he would have no right to deal with the property in 1916 when he transferred it to the plaintiff. But whether he had such right or not it seems to us that under S. 41 of the Transfer of Property Act the transfer in favour of the plaintiff is not voidable on the ground that the transferor, that is defendant No. 1, was not authorised to make it. It is clear that the property in suit continued in the name of defendant No. 1 and in his possession after 1908 as before his marriage with defendant No. 2. Under these circumstances, even if the ownership of the property be taken to be vested in defendant No. 2, it must be taken that the land continued to stand in the name of defendant No. 1 in the Revenue Record with the implied consent of defendant No. 2, and that at the date of the transfer in 1916 the defendant No. 1, and not defendant No. 2, was the ostensible owner. *Whether defendant No. 1 acted honestly in this matter or not is not the question. Apparently he acted in a manner which was in derogation of the right of his wife. But he being the ostensible owner and an assurance having been given to the present plaintiff that he was the owner and in possession, the plaintiff was entitled to act upon the belief that she was entitled to accept the transfer of property from him. No doubt the proviso to S. 41 of the Transfer of Property Act requires that the transferee after taking reasonable care to ascertain that the transferor has power to make the transfer must act in good faith. The facts of this case, as found by the lower

appellate Court, would justify the view that the requirements of this proviso are satisfied. The plaintiff was the wife of defendant No. 1's son, and unless he had transferred this property to her as Mahr possibly there might have been a difficulty in effecting the marriage. Such inquiry as the person in the position of the plaintiff would be expected to make must be taken to have been made by the plaintiff, and there can be no doubt that she acted in good faith and the ostensible ownership of defendant No. 1 was made possible with the implied consent of defendant No. 2. Therefore, this transfer in favour of the plaintiff must take effect as against the defendants. On these grounds we confirm the decree of the lower appellate Court and dismiss the appeal with costs.

Appeal dismissed.

1925 BOMBAY 301

SHAH, AG. C. J. AND KINCAID, J.

Sridhar Rambhau Mane—Plaintiff—Appellant.

v.

Gujabai Mhasku Showale—Defendant—Respondent.

Second Appeal No. 506 of 1923, Decided on 18th September 1924, from the decision of the Ag. Dt. J., Poona, in Appeal No. 127 of 1922.

Specific Relief Act., S. 54—Suit for declaration and injunction—Impending breach of rights proved—Allegation as to past breach not proved—Suit is not maintainable—Eligible reliefs may be affected.

A suit was filed by the plaintiff for a declaration that the defendant had no right to open new jalis or lattices in the wall in dispute, and for an injunction restraining the defendant from interfering with the closing of the said jalis by the plaintiff from his side. The plaintiff's allegation that the defendant had obstructed the plaintiff in closing up the jalis from his side was not proved. It was found that the plaintiff had a right to close up the jalis from his side.

Held: that the fact that the alleged obstruction by the defendant was not proved was no ground for dismissing the suit *in toto*, though it might affect the reliefs to be granted. [P 302 C 1]

Held: further that in the circumstances of the case it would be sufficient to declare the right of the plaintiff; reserving liberty to him to apply to the Court in case that right was not respected by the defendant. [P 302 C 2]

D. A. Tulzapurkar—for Appellant.

W. B. Pradhan—for Respondent.

Shah, Ag. C. J.—This second appeal arises out of a suit filed by the plaintiff for a declaration that the defendant had no right to open new jalis or lattices in the wall in dispute, and for an injunction restraining the defendant from interfering with the closing of the said jalis by the plaintiff from his side. It was alleged that the jalis were put up by the defendant in 1920 when the plaintiff was absent, and that though an attempt was made to close up the jalis on behalf of the plaintiff, that attempt was resisted by the defendant, and that the defendant insisted upon keeping the jalis open without any obstruction from the plaintiff's side. The defendant in her written statement maintained that both the jalis were ancient and not newly opened as alleged by the plaintiff. She repudiated the statement that she had caused obstruction to the plaintiff in any way and had removed the bamboo said to have been put up by the plaintiff. She did not in terms repudiate the allegation that she had insisted upon her right to keep the jalis unobstructed. On these pleadings issues were framed, and the trial Court found that the upper jali was ancient, and in fact it was admitted by the plaintiff that the upper jali was ancient. But the trial Court found that the lower jali was new as alleged by the plaintiff and that the defendant had no right to prevent the plaintiff from closing the jali from his side of the wall. The trial Court, however, was not satisfied that the plaintiff had in fact attempted to close the jali and that the defendant had prevented him from doing so. The Court did not consider it necessary to grant any injunction. It declared that the defendant had no right to create any new easement on the plaintiff's land by opening any new jalis to the south of the plaintiff's house and that she had no such right in respect of the lower jali recently opened by her in it.

The defendant appealed, and apparently the finding that the lower jali was new was not questioned. It was urged in the lower appellate Court that as the alleged obstruction on the part of the defendant was not proved the plaintiff had not suffered any injury and that the suit was not maintainable. This contention was allowed by the learned District Judge with the result that the plaintiff's suit was dismissed with costs throughout.

The plaintiff has appealed to this Court. It is urged in support of this appeal that whatever the nature of the relief which the Court may grant under the circumstances, the suit should not have been dismissed, and the question of jali being old or new should not have been left open when it was in fact proved that the jali was new. On behalf of the respondent it is not disputed before us that the jali is new. In fact the contention of the defendant in the trial Court was that it was ancient and that she had the right to maintain the jali unobstructed by the plaintiff. If the jali is new, as is now conceded and as was found by the trial Court, it is clear that the plaintiff would have the right to close the jali from his side and the defendant would have no right to obstruct him in doing so. Under these circumstances it seems to us that the suit should not have been dismissed but a relief appropriate to the facts found should have been awarded so as to prevent any further litigation on the same question which has been litigated in this suit. The view taken by the lower appellate Court appears to be based upon a somewhat narrow reading of the pleadings. The plaintiff alleged in this case that his right to close up the window from his side was denied by the defendant. He alleged further that actually the defendant obstructed him in closing the window. This last allegation was not proved but the other allegation that she had denied his right to close up the window was not denied in the written statement. Further the assertion in the written statement that this window was ancient goes to support the allegation in the plaint that the defendant had insisted upon maintaining his jali unobstructed on the side of the plaintiff and had not accepted the plaintiff's view of the matter. Under these circumstances, it is not reasonable in our opinion to hold that the suit is not maintainable. Under S. 54 of the Specific Relief Act when the defendant invades or threatens to invade the plaintiff's right to or enjoyment of property, the Court may grant a perpetual injunction in the cases mentioned in the section. In the present case there is an allegation that the defendant threatened to invade the plaintiff's right to enjoy his property without the new jali getting any light or air from his side, and as we have already stated the defendant contested the posi-

tion that the jali was new and maintained her right to obstruct the plaintiff. Thus there was sufficient basis for the trial Court to deal with the case on its merits; and it is not without significance that in that Court apparently no issue was raised as to the maintainability of the suit. The principle governing cases of this nature may be gathered from the judgment in *Bindu Basini Chowdhurani v. Jahnabi Chowdhurani* (1). As pointed out in that judgment (P. 264)—

"Whether the case is one in which an injunction or any other relief should be granted, or what precise form the injunction should take, are questions which the Courts dealing with the facts must decide with reference to the provisions of Ss. 53 and 54 of the Specific Relief Act. It may be that the plaintiff is not entitled to the relief which she claims or to relief in the particular form which she claimed it, but that would not make the suit unmaintainable."

Those observations apply to the facts of the present case. The finding that the plaintiff did not put up the bamboo to obstruct the window and that the defendant did not remove any such obstruction may affect the reliefs to be granted under the circumstances, but cannot render the suit unmaintainable. Under the circumstances of this case we think that it would be sufficient to declare the right of the plaintiff reserving liberty to him to apply to the trial Court in case hereafter that right is not respected by the defendant. We, therefore, allow this appeal, set aside the decree of the lower appellate Court and declare that the plaintiff has a right to close up the new window put up by the defendant in the wall from his side and reserve liberty to the plaintiff to apply for an injunction in case any obstruction is caused by the defendant in the assertion of that right.

The plaintiff to have his costs throughout. *Appeal accepted.*

(1) [1896] 24 Cal. 260.

1925 BOMBAY 302

MACLEOD, C. J. AND CRUMP, J.

Ratanji Dorabji—Plaintiff—Appellant.

v.

Kisandas Tribhovandas—Defendant—Respondent.

First Appeal No. 49 of 1920, Decided on 5th December 1924, from O. C. J. Suit No. 1127 of 1920, D/- 28th August 1920.

Landlord and Tenant—Lease—Covenant not to assign without lessor's consent—Consent unreasonably refused—Lessee can assign.

Where a lessee is obliged by a covenant in the lease not to assign his interest without the consent of the lessor but the lessor is not entitled to withhold his consent "unreasonably in the case of a respectable and responsible person", the refusal of consent by the lessor is unreasonable if it is found that the proposed assignees are respectable persons who can be trusted to fulfill their obligations under the lease. Even if it is shown that the proposed assignees are already tenants under the same landlord in respect of another letting and that they have defaulted in paying their rent, their respectability and fitness to be assignees of other lease cannot be affected provided that their not having paid the rent under their own lease has been due to a genuine dispute between the parties. The refusal of consent by the lessors unreasonably will entitle the lessees to assign without their consent. (P. 304 C. 2)

*Engineer and Bahadurji—*for Appellant
*Munshi and Kanga—*for Respondent.

Facts.—The plaintiff was a lessee from the defendants. The lease contained a covenant against assignment of the lease by the lessee without the consent of the lessors. The consent however, was "not to be unreasonably withheld in the case of a respectable and responsible person". The plaintiff wanted to assign the lease to certain K. D. & Bros. The landlords refused to give their consent on the ground that K. D. & Bros., were not desirable tenants and that they allowed rent to fall into arrears for a long time. The plaintiff sued for a declaration that the landlord's refusal of consent was improper and that he was entitled to assign without their consent. When particulars were asked for the defendant's furnished particulars which related to two premises of one of which K. D. & brothers were tenants and of the other of which they were sub-tenants. The suit was heard in the first instance by Marten, J., who held that K. D. & Bros., were respectable and responsible persons, and that a reasonable man would have accepted them as tenants under the circumstances, and that therefore, the defendants had unreasonably withheld their consent.

[The following is a portion of the Judgment of Marten, J. who originally heard the case :—]

I quite accept what counsel for the defendants said, that the onus of proof in this case is on the plaintiff. I also accept this, that the plaintiff has to prove (1) that the proposed assignee is a respectable and responsible person, and

(2) that the consent of the landlord has been unreasonably withheld. I mean this, you may have a perfectly respectable and responsible assignee and yet the landlord in some cases may be quite justified or may be quite reasonable in withholding his consent.

As regards the meaning to be put on the word "responsible," I think that word refers to the financial stability or condition of the proposed assignee. For instance, *Willmott v. London Road Car Company, Limited* (1) Lord Cozens Hardy said at p. 531 :—

"Suppose the words had simply been that consent should not be withheld in the case of a responsible person, I cannot bring myself to doubt that in that case a company which was admitted to be responsible in the sense of being able to discharge all obligations in respect of rent and covenants under the lease would be a responsible person within the meaning of that covenant, and therefore a person with respect to whom consent could not be refused."

And then at p. 537, Farwell L.J. said :—

"The responsibility relates to financial capacity, and it has hardly been urged and I think it is not arguable, that that, is not as applicable to a corporation or limited company as to an individual."

I should have said that the point in that case was whether a limited liability company could be a person within the meaning of such a covenant as I have here.

Then turning to the meaning of the word "reasonable," I find in the case of *Bates v. Donaldson* (2), at p. 243, Kay L. J. saying this —

"It is plain on the face of that covenant that it is not sufficient that the proposed assignee should be a respectable and responsible person. The words clearly show that the landlord may nevertheless have some reasonable ground for refusing his consent. I shall not attempt to give any exhaustive definition of what would be in every conceivable case an unreasonable withholding of permission. The only question which it is necessary to consider is whether in the circumstances of this case the refusal was reasonable within the meaning of this covenant."

(1) [1910] 2 Ch. 525=80 L. J. Ch.=103 L. T. 447=54 S. J. 873=277 L. R. 4.

(2) [1896] 2 Q. B. 241=65 L. J. Q. B. 576=60 J. P. 596=74 L. T. 751=44 W. R. 659.

Then, after giving some instances where a landlord might reasonably object, the learned Judge at the bottom of p. 244 proceeds :—

“As the proposed assignee in this case is a respectable and responsible person, the plaintiff must show a strong reason for withholding his consent. Clearly it is not sufficient for him to say, ‘I want to oblige the lessee to sell to me.’”

Then Smith L. J. at p. 246 says :—

“It will be seen that it is only when a respectable and responsible person is proposed as assignee or under-tenant that this clause...comes into play. If the person proposed be not a respectable and responsible person, the lessor has an absolute right to refuse permission: if, however, the person proposed be respectable and responsible, then the lessor cannot unreasonably withhold his permission.”

Then he asks, what is an unreasonable withholding of permission; and after thinking that it would be unreasonable for the lessor to withhold his consent for the purpose of breaking the lease and taking the premises for himself, the Lord Justice continued (p. 247) :—

“It was in my judgment inserted *alio intuitu* altogether, and in order to protect the lessor from having his premises used or occupied in an undesirable way or by an undesirable tenant or assignee, and not in order to enable the lessor to, if possible, coerce a tenant to surrender the lease so that the lessor might obtain possession of the premises.”

Then I may refer to one other case, which Mr. Taraporewala cited to me, of *Shanley v. Ward* (3). Speaking generally I do not think that those reports are usually useful for dealing with principles to be applied in India. I think, however that Mr. Taraporewala was right to this extent that the judgment of the Master of the Rolls has words which are appropriate here, and which I think form a good basis for deciding what is the proper test to be applied here. After saying that in effect the onus of proof is on the plaintiff the learned Judge proceeds (p. 715) :—

“What did unreasonableness mean? It was not enough to show that the other lessors might have accepted the proposed assignees: the lessors were not to be held to have withheld the licence unreasonably if in the action they took they acted as a

reasonable man might have done in the circumstances.”

Then they dealt in the course of the case with the letter of August 21 where the defendant had refused his consent without giving any reasons, and held that if that letter had stood alone it would have been unreasonable. I think, therefore, that Vaughan Williams L. J.’s statement in *Young v. Ashley Gardens Properties, Limited* (4) cannot be taken literally. He says there at p. 115: “It was urged upon us that a landlord is not bound to give any reason for refusing his licence. I agree.” Mr. Taraporewala submitted that the learned Judge only meant that the landlord is not bound to give his reasons, but if he chooses to take that course, he does so at his peril, because it would be unreasonable conduct in such a covenant as we have to deal with, and might consequently enable the tenant to assign without license. At any rate that is not the point I have to deal with in this present case. Mr. Taraporewala did not contend and in my opinion would not successfully contend that he was entitled to take up the attitude that his client was entitled to refuse his consent and give no reasons. Counsel for the defendants urged that the standard to adopt here is what would a reasonable man do? Would on the facts of this case a reasonable man have withheld his consent to the assignment to K. D. & Brothers? I accept that standard.

[The present appeal was from the above judgment.]

Judgment.—We think that the learned Judge in the Court below was right in holding that the defendants’ consent to the proposed assignment of the lease had been unreasonably withheld, the ground being that there had been a dispute between the landlord and the tenant with regard to another letting. The learned Judge has found as a fact that there was a genuine dispute between the parties, that there was not a determination on the part of the tenant to decline to pay rent, but an objection to pay until the particulars of the tenancy had been definitely ascertained, which was not done till 1919. The appeal, therefore, must be dismissed with costs.

Appeal dismissed.

(3) [1913] 29 T. L. R. 714

(4) [1903] 2 Ch. 112=73 L.J. Ch. 520=88 L.T. 441.

1925 BOMBAY 305

SHAH, AG., C. J. AND KINCAID, J.

Hassanalli Degumiya—Plaintiff—Appellant.

v.

Ruhulla Hamad—Defendant—Respondent.

First Appeal No. 141 of 1920, Decided on 10th September, 1924, from the decision of the Sub. J., Surat, in Suit No. 206 of 1917.

(a) *Pardanashin lady*—Deed by—Onus of proof is on party benefited—Onus varies according as deed is injurious or not to lady.

Where a Pardanashin lady is concerned, the burden of proof rests upon him who would seek to take advantage of a document executed by her. It is for him to show that the lady comprehended thoroughly and deliberately and of her own free will carried out the deed. But this rule has to be followed intelligently. The Court will gauge the burden of the proof, which the plaintiff has to discharge, on a careful consideration whether the document by which he seeks to profit was or was not injurious to the Pardanashin lady who executed it. [P 303 C 1, P 307 C 1]

(b) *Mahomedan Law*—*Marz-ul-maut*—Deed executed during—Onus of proof lies on party attacking.

The burden of proof of a deed of gift executed during death-illness rests on the party assailing the deed. [P 307 C 1]

(c) *Mahomedan Law*—*Marz-ul-maut*—Proximate danger of death, subjective apprehension of death, and inability to attend to ordinary avocations are essential.

In order to establish *marz-ul-maut* there must be present at least these conditions :—(a) Proximate danger of death, so that there is, a preponderance of apprehension, that is, at the given time death must be more probable than life. (b) there must be some degree of subjective apprehension of death in the mind of the sick person ; (c) there must be some external indicia, chief among which may be placed the inability to attend to ordinary avocations. [P 307 C 1]

(d) *Mahomedan Law*—Gift—Declaration of intention, transfer in Government Register and asking tenants to attorn to donee are enough.

Where the donor declared his intention to part with the possession of the gifted property and his intention was manifested by actual transfer of the property in the name of the donee in the Municipal and Government Land Record and he asked his tenants to attorn to the donee.

Held ; that there was proper transfer of possession to validate a deed of gift. [P 308 C 1]

Bahadurji and M. H. Mehta—for Appellant.

G. N. Thakor, R. J. Thakor and J. G. Relu—for Respondent.

Kincaid, J.—The facts of this case though the hearing has taken consider-

1925 B/39 & 40

able time, are really not very complicated. They are shortly as follows. A certain Nanumiyan, a Musalman resident of Broach, had a daughter called Asha Begam. On January 12, 1912, he gave her certain property by a deed of gift. He, however, retained management of the property until his death in 1914. Thereafter Asha Begam assumed its management until her death in July 1917. On April 14, 1917, she passed Exhibit 29, by which document she created a wakf of property worth Rs. 19,999 for the benefit of her deceased father Nanumiyan's soul in favour of her grand-father's mosque Gulamali Fozdar situated in Broach city. By the terms of the document she was to be Mutawali during her life-time. On her death, her maternal uncle was to succeed as Mutawali, and after him his son Abasalli and others of his descendants. The income of this property was estimated at Rs. 900. Of this income she directed that Rs. 500 should be spent on the mosque and Rs. 400 reserved to the Mutawali. As I have said, Asha Begam died in July 1917, and in ordinary circumstances her husband and her own agnates would have succeeded to her estate. But Asha Begam had never lived with her husband, and her father Nanumiyan had been on bad terms with his relations. Thus, while her husband took possession of Asha Begam's property, claiming to be her heir, the maternal uncle has brought the present suit to eject him.

The husband is defendant No. 1 ; defendant No. 2 is one of the agents and defendants Nos. 3 and 4 are tenants of the property in dispute. The defendants contended that the gift of Nanumiyan was invalid as there had been no proper delivery of possession and that Asha Begam's wakf was invalid and inoperative in law.

In the trial Court, the Subordinate Judge, Mr. Bhat, held that the deed of gift by Nanumiyan to Asha Begam was operative. He also held that the plaintiff had not proved that the deed of wakf executed by Asha Begam, a pardanashin lady, had been made by her of her own free will and not under duress. He dismissed the suit.

The plaintiff appealed to the High Court and their Lordships per Macleod, C. J. and Coyajee, J. remanded the case to the trial Court for a decision on the following issues :—

(1) Whether Asha Begam thoroughly comprehended, and deliberately and of her own free will carried out, the deed of wakf?

(2) Whether the deed was executed during her death-illness?

On remand the case was heard by Mr. Bhat's successor, Mr. Cooper. After discussing the evidence in a careful and exhaustive judgment, he found on the issues (1) in the negative and (2) in the affirmative.

Against these findings Mr. Bahadurji, who represented the plaintiff, has argued that they were incorrect, and Mr. Thakor for the defendants has supported their correctness.

I should like, before proceeding further with my judgment, to thank the learned advocates on both sides for the exhaustive way in which they have dealt with the case. Their arguments have occupied two days, and every conceivable point, which could have been taken on both sides, has, I think, been taken. •

Coming to the two issues, there is no question but that where a Pardanashin lady is concerned, the burden of proof rests upon him who would seek to take advantage of a document executed by her. It is for the plaintiff in this case to show that Asha Begam comprehended thoroughly and deliberately and of her own free will carried out the deed of wakf. But in my opinion, this rule has to be followed intelligently. To put an extreme case, where a Pardanashin lady had bought a property for Rs. 5,000, and six months later sold it for Rs. 50,000, the person who wished to take advantage of the document by which the lady transferred her rights for Rs. 50,000, would have very little difficulty in persuading a Court that there was neither fraud, nor duress nor undue influence.

In the converse case, however, where a Pardanashin lady owning property apparently worth Rs. 50,000, sold it for Rs. 5,000, the person, who wished to take advantage of the second transfer, would have to discharge a heavy burden and prove fully that the executant knew and understood all that she was doing. I am fortified in this opinion by the cases of *Mahomed Buksh Khan v. Hosseini Bibi* (1) and *Kali Bakhsh Singh v. Ram Gopal*

Singh (2). In the former case we find the following passage at p. 91 :—

"Then comes the question, was the deed executed under such circumstances that it ought not to be allowed to stand? Duress and coercion may be laid out of consideration. The witnesses who speak to anything of that kind were discredited by both Courts. But there remains the more subtle form of undue influence. Their Lordships desire not to say a word which could interfere with the settled principles on which the Court acts in considering the deeds of pardanashin ladies or could tend to lessen the protection which it is the duty of the Court to throw around those who are unable to protect themselves. They do not forget that this lady was a pardanashin lady. They do not forget that at the time of the execution of the deed she was living in more than ordinary seclusion; that she was in very deep distress; and that she was surrounded by members of that branch of the family to which the objects of her bounty more immediately belonged. But bearing all these things in mind, and reviewing the whole evidence, they come to the conclusion that the lady knew perfectly well what she was doing, and that in every sense the act was her own act."

In the second case, that of *Kali Bakhsh Singh v. Ram Gopal Singh*, we find this passage at p. 31 :—

"Their Lordships, as already mentioned have fully in view the fact that the lady was a pardanashin lady, but the evidence as to her strength of will and business capacity, and the fact that the deed as granted is not in the circumstances of her life in any way an unnatural disposition of part of her property, so far, taken together with the evidence in this case, to convince them that the deed was granted by her as the expression of her deliberate mind and apart from any undue influence exerted upon it. In short their view is that if independent outside advice, which is an essentially different thing from independent outside control, had been obtained the lady would have acted just as she did. Much as their Lordships support and approve of the protection given by law to a

(2) [1913] 36 All. 81=41 I.A. 23=16 O.C. 378=18 C.W.N. 282=12 A.L.J. 115=15 M.L.T. 130=19 C.L.J. 172=5 O.L.J. 67=26 M.L.J. 121=16 Bom. L.R. 147=21 I.O. 985=(1914) M.W.N. 112=(P.C.)

(1) [1888] 15 Cal. 684=15 I.A. 81=5 Sar. 175 (P.C.)

pardanashin lady, they cannot transmute such a legal protection into a legal disability."

The learned advocate for the respondents has relied on the case of *Kamawati v. Digbijai Singh* (3). But there the *Pardanashin* lady had passed a document substantially without consideration by which she relinquished all her rights in respect of her inheritance.

This appears to be really the second part of my proposition that the Court will gauge the burden of proof, which the plaintiff has to discharge, on a careful consideration whether the document by which he seeks to profit was or was not injurious to the *Pardanashin* lady who executed it.

[His Lordship discussed the facts and the evidence in the case and proceeded:—]

I, therefore, find on the first issue in the affirmative, and not in the negative as the learned Subordinate Judge has found.

Coming to the second issue, it must be borne in mind that here the burden of proof rests no longer on the plaintiff but on the defendants. The defendants have sought to base their arguments on a peculiarity of Mussalman law which requires that the document to be effective should not be executed during death-illness of *marz-ul-maut*. In *Sarabai v. Rabiabai* (4) Batchelor, J. laid down with great lucidity the principles of Mahomedan law as gathered by him from earlier authorities. The pertinent passage runs as follows (p. 550):—

"I admit that this question is not to be decided merely upon medical principles as now ascertained among Western peoples: but my examination of the authorities leads me to the conclusion that in order to establish *Murz-ul-maut* there must be present at least these conditions:—

(a) Proximate danger of death, so that there is, as it is phrased, a preponderance (*ghaliba*) of *khauf* or apprehension that is, that at the given time death must be more probable than life:

(b) there must be some degree of subjective apprehension of death in the mind of the sick person:

(c) there must be some external indicia, chief among which I would place the inability to attend to ordinary avocations."

(3) [1921] 43 All. 525=48 I.A. 381=15 L. W.)

(P. O.)

(4) [1905] 30 Bom. 532=8 Bom. L. R. 35.

These incidents, as laid down by Batchelor, J., were accepted in the case of *Rashid v. Sherbanoo* (5) by a Division Bench of this Court consisting of Batty and Pratt, JJ.

We have, therefore, to consider whether the defendants have established that at the time when Exhibit 29 was executed, Asha Begam was in proximate danger of death or was in fear of death, and was unable to attend to her ordinary avocations. There seems no doubt but that some months before her death Asha Begam was suffering from chronic diarrhoea, or the kindred disease sprue. That is the evidence of Dr. Kellawalla whose evidence is relied upon by the lower Court, and there is no reason to suppose it to be untrue. But both chronic diarrhoea and sprue are diseases which can be cured, and there is really no evidence before us that Asha Begam died either of diarrhoea or of sprue. The death register merely contains an entry that she died of fever. But even if it be assumed that she did die of sprue, where is the evidence that she was at the time when she executed Exhibit 29 in fear of death? There is absolutely none except that of one witness who said that she was 'sick of life. That witness, however, is defendant No. 2, who is deeply interested in the decision of this case.

As regards the question whether she was unable to attend to her ordinary avocations, all the evidence goes to show that at the time when she executed Exhibit 29 Asha Begam was not confined to her bed, and that she was able to walk about and attend to her household business. This is indeed what one would naturally expect in the case of a lady who executed the document, and did not die until three months later, even though she may have been suffering in April from sprue to which she eventually succumbed in July.

This disposes of the two main points in the case. But the learned advocate for the respondents has referred to two other minor points for our consideration. He has contended that the document Exhibit 29 left 91 shares out of 100 of Asha Begam's property undisposed of. But that matter has really been dealt with by the learned Subordinate Judge Mr. Cooper. I agree with him in holding that although there was some confusion in the way the

(5) [1906] 31 Bom. 364=9 Bom. L. R. 252.

document was worded, the meaning is really quite clear, and that the intention of the executant was to divide her property as 5 is to 4 between the mosque and the Mutawali.

The second point is whether the gift to Asha Begam by Nanumiyan, her father, was invalid. This point has been dealt with very clearly by the first learned Subordinate Judge who tried this case. The argument of the learned advocate was that there was no proper transfer of possession. But the case cannot be better stated than in Mr. Bhat's own words :—

"It was clear intention to part with the gifted property. He effected the transfer and he did all that could possibly be done under the events...."

"In the present instance Nanumiyan did declare his intention to part with the possession of the gifted property and his intention was manifested by actual transfer of the property in the name of Asha Begam in the Municipal and Government Land Records and he asked his tenants defendants Nos. 3 and 4 to attorn to Asha Begam."

"The act of Nanumiyan in residing with Mithi shows his declaration that he wanted to make the deed of gift complete."

The view of the learned Subordinate Judge is agreeable to the view of their Lordships of the Privy Council in *Sheikh Muhammad Mumtaz v. Zubaida Jan* (6).

For the above reasons we reverse the decree of the lower Court and pass a decree for possession of the property, as prayed for, against the four defendants together with mesne profits from the institution of the suit until delivery of possession to the plaintiff or the expiration of three years from the date of the decree whichever event first occurs. Mesne profits to be determined by the trial Court.

The appellant to get costs throughout from defendants Nos. 1 and 2.

Shah, Ag. C. J.—[His Lordship held on the facts that the Pardanashin lady had executed the deed in full realisation of its provisions and their effect on her position, and proceeded:—]

As regards the question whether the document was executed during *marz-ul-maut* in addition to the cases which have been referred to by my learned brother, I would refer to the observation in *Fatima*

Bibi v. Sheikh Ahmed Baksh, (7) that "the right test was whether the deed of gift was executed by the donor under apprehension of death."

Even assuming in this case that she died in July 1917 of chronic diarrhoea, which she was apparently suffering from, it is very difficult, under the circumstances, to draw the inference that she was under the *khauf* or apprehension of death on April 14, 1917, when the document, Exhibit 29, was executed. This was nearly three months before death. The evidence of witnesses on either side is really very unsatisfactory, and does not enable the Court to come to any conclusion with any degree of confidence. There are, however, references to illness in the letters written by the plaintiff about this time to her, and it is a reasonable inference that in April about this time she was suffering from diarrhoea. As to what the exact nature of the complaint then was, we are not in a position to determine. We have the evidence of Dr. Kellawalla, which has been believed by the learned Judge, and which we may accept. But the infirmity of that evidence is that it does not fix with any degree of precision the time when Dr. Kellawalla examined Asha Begam. There are no notes of the case from which the Doctor could have refreshed his memory. He gave evidence a long time after he examined Asha Begam, and he says that he examined her once. His opinion that she suffered from sprue is entitled to weight. But, on the questions whether the disease was diagnosed to be incurable then or whether she was under apprehension of death in April when the document was executed, the evidence of the Doctor does not throw any useful light. The rest of the evidence as to the nature of the illness leaves the matter in a very unsatisfactory condition. After a careful consideration of the evidence in the case, I have come to the conclusion that the document was duly executed by Asha Begam, that she knew what she was doing, and that the main object she would have in view, namely, to see that her heirs according to law did not get this property was secured by this document. Also, on the question of illness, I am satisfied that though she was

(6) [1889] 11 All. 460=16 L. A. 205=6 Sar. 433 (P. O.)

(7) [1907] 35 Cal. 271=35 L. A. 67=12 C.W.N. 214=18 M.L.J. 6=7 C.L.J. 212=3 M.L.T. 110=10 Bom. L. R. 50=14 Bur. L. R. 263 (P. C.)

ill in April 1917, she was under no *khauf* of death at the time. It does not appear clearly what the duration of the illness was at that time; and if it was no more than a chronic complaint, there would be no good reason to hold that she was under any apprehension of death in April, nearly three months before she died.

Appeal accepted.

★ ★ 1925 BOMBAY 309 Full Bench

MACLEOD, C. J., SHAH AND CRUMP, JJ.

Mehbunissa Begum—Appellant.

v.

Mehedunissa Begum—Respondent.

First Appeal No. 194 of 1923, Decided on 19th December, 1924, from the decision of the First Class Sub. J., Surat, in Darkhast No. 289 of 1921.

★ ★ Civil P. C., O. 21, R. 2—*Uncertified payment—Executing Court cannot recognise—40 B. 333 overruled.*

The Court executing a decree is barred *in limine* from considering any allegation that a payment not certified has been made. 40 Bom. 333 Overruled, 1923 Bom. 253 affirmed. [P. 309, C. 2.]

G. N. Thakor and H. V. Divatia—for Appellant.

S. S. Patkar—for Respondent.

Macleod, C. J.—The plaintiff applied for execution of a decree passed on June 28, 1916, claiming against defendant No. 1 only, the four instalments which had become payable for the years 1917-18 to 1920-21. After the darkhast was issued defendant No. 1 died and his representatives were placed on the record. They put in a written statement in which they pleaded that though the plaintiff had recovered the amount to the extent of the shares of all the defendants except the deceased defendant No. 1, he had presented the darkhast for the recovery of the whole of the amount due under the instalments fixed by the decree without giving credit for the amount recovered therein, that the plaintiff had dishonestly presented the darkhast for the whole of the amount and had made a false affirmation and so sanction should be granted for instituting legal proceedings against him, and that he should be made to give credit in the suit for the amount recovered by him.

It is admitted that these payments had not been certified according to the provi-

sions of O. 21, R. 2 (1) and (2). Accordingly the learned Judge held, following the decisions of this Court in *Gharry v. Gowrya* (1) and *Ganesh v. Yeshwant*, (2) that such payments could not be recognized.

The appellants have relied on the decision in *Hansa v. Bhawa*, (3) where it was held that a Court executing a decree could deal with the question whether uncertified payments had as a matter of fact been made or not. Judgment was given in accordance with the opinion expressed by Heaton, J. in *Trimback v. Hari Laxman*, (4) which was obiter for the purposes of the decision in that case, as the executing Court had held that the party executing the decree was estopped from disputing that payments had been made, and the High Court in appeal held that the decision was wrong.

I am of opinion that the decision in *Hansa v. Bhawa* (3) cannot be supported.

The words in O. 21, R. 2 (3), are too plain to admit of any other construction than that the Court executing a decree is barred *in limine* from considering any allegation that a payment not certified has been made. The party alleging such a payment may have a remedy, but not before the Court executing the decree.

On the question whether the written statement of the legal representatives of the deceased first defendant can be treated as an application to record the alleged payments, I agree with the remarks of my brother Shah.

The appeal, therefore, must be dismissed with costs.

Shah, J.—After consideration of the arguments and the conflicting rulings, I am of opinion that in view of the provisions of O. 21, R. 2, sub-rule (3), the executing Court cannot recognise any payment not certified or recorded as provided in sub-rules (1) and (2) of the same rule. The wording of sub-rule (3) is quite clear and admits of no escape therefrom on such general considerations as have been referred by Heaton, J. in *Trimback v. Hari Laxman* (4) and accepted in *Hansa v. Bhawa* (3). Such considerations may

(1) 1922 Bom. 380=46 Bom. 226=28 Bom. L. R. 981.

(2) 1923 Bom. 253=25 Bom. L. R. 247.

(3) [1916] 40 Bom. 333=33 I. O. 232=18 Bom. L. R. 22.

(4) [1910] 34 Bom. 575=7 I. O. 940=22 Bom. L. R. 686.

afford a sufficient ground to modify the provisions of sub-rule (3) or to repeal article 174 of the Indian Limitation Act so as to make it permissible to the judgment-debtor to apply at any time to have the payment recorded. But they cannot afford any sufficient ground for refusing to give effect to the plain and unambiguous words of the sub-rule in question.

With great respect, I think that the view taken by the Court in the later decision referred to in the referring judgment is correct.

As regards the question whether the written statement of the legal representatives of defendant No. 1 can be treated as an application to record the alleged payments the difficulty is that even treating it as an application for that purpose it is beyond time: and there is no ground of exemption mentioned in the application. The only ground suggested by the learned counsel for the applicants is that under S. 18 of the Indian Limitation Act, on the ground of fraud exemption could be claimed. It is difficult to deal with a suggestion of this nature in the absence of any specific allegation of fraud and to decide whether S. 18 can help the appellants. It may be possible for the appellants on a proper application to have the alleged payments recorded by the Court under R. 21 of O. 21. I express no opinion on that point.

I am satisfied that, having regard to the allegations in the written statement, it is not reasonably possible to allow the appellants' contention as to exemption from limitation on the special ground that by means of fraud they were kept away from the knowledge of their right to make an application to have the payments certified.

I agree, therefore, that the appeal should be dismissed with costs.

Crump, J.—I agree that there is no doubt or difficulty about the point referred to the Full Bench and that the answer must be that the Court executing the decree cannot in any case recognize an uncertified payment. I also agree that in this case it is not possible to treat the written statement of the judgment-debtor as an application to certify the payment made within the period allowed by law.

Appeal dismissed.

1925 BOMBAY 310.

PRATT AND CRUMP, JJ.

Supadi Lukadu—Appellant.

v.

Emperor—Opposite Party.

Criminal Appeal No. 14 of 1925, Decided on 24th March, 1925, from conviction and sentence passed by Add. S. J., Kandesh.

Penal Code, S. 304 A—Causing death of child—Accused attempting to commit suicide by jumping in a well with child on her neck—Child dying in consequence—Offence is one under S. 304A but not under S. 30.

Where a girl of 17 years of age being tired of her husband's ill-treatment attempted to commit suicide by jumping into a well and she had no consciousness that her child was on her neck and she jumped with the child and the child died of the jump though the girl survived.

Held that the girl was only guilty under S. 304 A. [P. 311, Cl.]

S. S. Patkar—for the Crown.

No one appeared for the Accused.

Pratt, J.—This appeal has been admitted though time-barred and I would deal with it in our revisional jurisdiction.

The accused has been convicted of an attempt to commit suicide and of the murder of her infant daughter.

The accused Supadi is a girl of seventeen years of age unhappily married to a man called Lukadu. Her mind was distracted by the illness of her infant daughter and she was anxious to go back to her father's house where she would get rest after the drudgery of her unhappy home, and time to attend to her ailing infant. Her father and sister came to see her home but the husband refused because he wanted her to stay at home and do the household work. Supadi was much disappointed and the next morning her father tried to take her back when the husband was absent. But the husband intercepted the cart and forced Supadi to return. This fresh disappointment was too much for Supadi who was already sorely tried by her husband's ill-treatment and the illness of her infant. She did go back, but instead of going to her husband's house she jumped into a well in order to drown herself. At the time she jumped in, her infant was tied on her back. She was found in the well the next day but the infant was drowned. When she was taken out she burst into tears and clasped the dead body of her child.

She has been rightly convicted of attempt to commit suicide but I cannot bring myself to believe that she is guilty of murder of the infant.

The Sessions Judge does not believe that she had any intention of causing the death of the child. He applies S. 300(4) on the ground that she must have known that jumping into the well with the child was so imminently dangerous that the act would in all probability cause the child's death. That would be true if the accused at the time she jumped into the well were conscious of the presence of the child on her back. But her mind was in so abnormal a condition that she was at the moment attempting to commit suicide. I believe, therefore, that she was not thinking at the time of the child and that she was not conscious of the child's presence. As she was not conscious of the child there was not such knowledge as to make S. 300 (4) applicable. But that lack of consciousness implies negligence for, as said by Holloway, J. in *Nidamarti Nagabhushanam*, (1) 'culpable negligence is acting without the consciousness that the illegal and mischievous effect will follow, but in circumstances which show that the actor has not exercised the caution incumbent upon him, and that, if he had, he would have had the consciousness.'

The offence which accused has committed is, in my opinion, not murder, but causing death by a negligent omission. i. e., the omission to put the child down before jumping into the well.

I would alter the conviction under S. 302 to one S. 304 A and reduce the sentence to six months' simple imprisonment to run concurrently with the sentence under S. 309.

Crump, J.—It is a matter of some difficulty to determine what was the precise intention or knowledge of the accused at the moment when she threw herself into the well, and though it might be argued that she must have known that her child was with her, and that even if she did not intend its death, she knew that her act was so imminently dangerous that death was the most probable result, still the conclusion which commends itself to my learned brother is equally one which can be drawn from the proved facts. Where the balance is so equal I prefer to

lean in favour of the accused. Therefore I agree with the order proposed.

Conviction and sentence altered.

★ ★ 1925 BOMBAY 311

MACLEOD, C. J. AND COYAJEE, J.

Mahadev Narain Joshi—Plaintiff—Appellant.

v.

Shridharbhat Gopulbhat Joshi—Defendant—Respondent.

Second Appeal No. 43 of 1924, Decided on 22nd January, 1925, from the decision of the Dt. J., Belgaum.

★ ★ Civil P. C. S. 11—*Several mortgages on the same property—Mortgagor suing for accounts under S. 15 D of the Dekkhan Ag. Rel. Act under one mortgage—Mortgagee putting forth other mortgages—Court deciding suit only with respect to one mortgage—Subsequent suit on other mortgages by mortgagee is not barred.*

If a mortgagor executes several mortgages on the same property, and asks for an account on one mortgage under S. 15 D of the Dekkhan Agriculturists' Relief Act, and the mortgagee claims that an account should be taken of all the mortgages existing on the property, so that the mortgagor would not be entitled to redeem except on paying what is due on all the mortgages, and still, if the Court takes an account of the one mortgage only, and decides nothing with regard to the validity of or the existence of other mortgages at the time when the account is taken, a subsequent suit by mortgagee to recover under the other mortgages is not barred under S. 11.

[P. 313, C 1, 2]

Nilkanth Atmaram—for Appellant.

A. G. Desai—for Respondent.

Macleod, C. J.—The plaintiffs sued to recover on a mortgage bond for Rs. 200 dated August 28, 1912 passed by the defendant to one Krishnaji Govind Joshi the grand-father of the plaintiff. The defendant contended that the plaintiffs had no right to file the suit; that the debt had not come to plaintiffs' share; that the land in suit had been mortgaged with possession in 1882 to the great-grandfather of the plaintiffs: that it had been decided in suit No. 325 of 1917 that this mortgage had been paid off; that the suit debt having not been claimed in that suit the present suit was barred by *res judicata*; and that the suit debt had been paid off by the income of the land from the date of the suit mortgage.

The trial Judge held that the claim was barred as *res judicata* on account of the decree in Suit No. 325 of 1917.

(1) [1872] 7 M. H. O. R. 119.

The facts are that the land in suit, Survey No. 44, and another survey number were mortgaged by the defendant's father to the plaintiffs' grandfather in 1882. The defendant filed Suit No. 325 of 1917 under S. 15D of the Dekkhan Agriculturists' Relief Act for accounts to be taken of what was due under that mortgage. The present plaintiffs, who were defendants in that suit, pleaded that there was a simple mortgage for Rs. 200 passed in 1912 still outstanding, and that the then plaintiff would have to redeem that mortgage also in the suit. No issue was raised on the question. The Court took an account of the mortgage of 1882 and decided that nothing was due on the mortgage deed in the suit. S. 15D of the Dekkhan Agriculturists' Relief Act provides that at any time before the decree in the suit is signed the plaintiff may apply to the Court to pass a decree for the redemption of the mortgage. Accordingly, as the plaintiff prayed for redemption and possession, and as the suit could be so converted at any time before the decree in the suit was signed the Court made the following order:—"It is declared that the mortgage charge on the plaint properties held under the mortgage deed dated September 20, 1882, is fully satisfied, and that nothing remains due to defendants on that account. The plaintiff to recover immediate possession of plaint lands from defendants free of the above said mortgage charge."

On these facts the learned Subordinate Judge said:—

"Explanation V of S. 11 of the Civil Procedure Code does not also apply as it refers only to the relief claimed in the plaint. But the provisions of S. 11 are not exhaustive as laid down in *Ramamurti Dhora v. The Secretary of State* (1) and *Hukum Chand Boid v. Kamalanand Singh* (2). The matter can be *res judicata* even between co-defendants as suggested in *Hari Annaji v. Vasudev Janardan* (3). Reading this decision with Explanation V of the section, I think it can be held that the relief claimed by the defendants in Suit No. 325 was refused by the Court. I find that the suit is barred by *res judicata*."

In appeal the learned appellate Judge said (referring to Suit No. 325 of 1917):—

"In that suit the present plaintiffs pleaded that the mortgage bond (Exhibit 22) now in suit must be redeemed as well as the 1882 mortgage. As however they failed to produce any evidence, the trying Court held that nothing was due to them and directed the return of both Survey Nos. to Shridhar free of the above said mortgage charge."

That is not a correct exposition of what took place in the previous suit as appears from the judgment and the decree passed. The Court raised no issue on the question whether the mortgage of 1912 was outstanding, and could be redeemed in the suit, but took an account only of the mortgage of 1882, and directed the return of both survey numbers free of that mortgage charge, without making any reference to the mortgage of 1912. The appellate Judge went on to say:—

"The wording of the decree would seem to favour appellant's contention that the later mortgage of 1912, the one now in suit, was not dealt with in Suit No. 325 of 1917. It has, however, been laid down in *Babaji v. Hari*, (4) that in case of there being several mortgage bonds the account (taken under S. 15 D, Dekkhan Agriculturists' Relief Act) must be taken of all of them in the same suit. Appellant himself drew the Court's attention to the existence of the 1912 mortgage but did not attempt to prove it, in Suit No. 325 of 1917. As he failed to prove it in that suit he cannot be allowed another opportunity of doing so now. His claim was advanced in Suit No. 325 of 1917. It was not proved by him and it must be held to have been rejected by the Court. I agree with the lower Court that the present suit is barred as *res judicata*."

The suit referred to by the learned Judge in *Babaji v. Hari* (1) was brought by the mortgagors of certain land against the mortgagee under S. 15 D of the Dekkhan Agriculturists Relief Act for an account of the amount due. There were six mortgages in all and the aggregate amount secured was Rs. 5,750. In the course of the suit the plaintiff's pleader being doubtful as to the jurisdiction of the Court of the Second Class Subordinate Judge, the pecuniary limit of which was Rs. 5,000, was allowed to amend the plaint and to withdraw the claim with regard to one of

(4) [1891] 16 Bom. 351.

(1) [1911] 35 Mad. 141=19 I. C. 656=24 M.L.J. 469.

(2) [1905] 33 Cal. 927=3 C. L. J. 67.

(3) [1914] 38 Bom. 438=23 I. C. 944=16 Bom. L. R. 283.

the mortgages for Rs. 900, thus reducing the aggregate amount to Rs. 4,850. On a reference made to the High Court for its opinion, the Court said (p. 352):—

"We think that S. 15 D of Act XVII of 1879, which provides for a suit of an exceptional character, was intended to give the mortgagor the power of obtaining an account of what was due on mortgage of his property, and, therefore, in case of there being several mortgage-bonds, the account must be taken of all of them in the same suit, and if the total amount, as in the present case, exceeds Rs. 500, the case does not fall under Chapter 2 of the Act. If it exceeds Rs. 5,000 the First Class Subordinate Judge alone has jurisdiction."

It will be seen that that case does not touch the question of *res judicata*. The only way in which the principle of *res judicata* can be made applicable would be if Explanation IV to S. 11 was in point. It provides that "any matter which might and ought to have been made ground of defence or attack in such former suit shall be deemed to have been a matter directly and substantially in issue in such suit."

Now the defendant in the previous suit pleaded, on the question whether an account should be taken of the mortgage of 1882, that an account should also be taken of the mortgage of 1912. The question in issue would have been whether the plaintiff was entitled to an account of the mortgage of 1882 only. That would not touch the question whether the plaintiff, the then defendant, was entitled to sue on the mortgage of 1912. It is difficult then to see how the principle of *res judicata* can apply to the present case. We do not know the circumstances which surrounded the trial of Suit No. 325 of 1917, or why no issue was raised on the defendant's plea. It may very well have been that the plaintiff did not wish the accounts to be taken on the basis suggested by the defendant. However that may be, we cannot know what the actual facts of the case were. We can only refer to the record before us.

In my opinion if a mortgagor executes several mortgages on the same property, and asks for an account on one mortgage under S. 15 D of the Dekkhan Agriculturists' Relief Act, although the mortgagee could ask that an account should be taken of all the mortgages existing on the pro-

perty, so that the mortgagor would not be entitled to redeem except on paying what is due on all the mortgages, still, if the Court takes an account of the one mortgage only, it decides nothing with regard to the validity or the existence of other mortgages at the time when the account is taken. In my opinion, therefore, the decision of the lower Court was wrong and the appeal must be allowed. The case must go back to the trial Court for decision on the merits. The plaintiffs are entitled to their costs in this Court and in the Court below. All costs in the trial Court will be costs in the cause.

Coyajee, J.—I agree.

Appeal allowed.

★ 1925 BOMBAY 313

MACLEOD, C. J. AND COYAJEE, J.

Hirabhai Danyabhai—Plaintiff—Appellant.

v.

Manek Lal Ranchhod—Defendant—Respondent.

First Appeal No. 48 of 1924, Decided on 21st January 1925, from the decision of the First Class Sub. J., Ahmedabad.

★ Civil P. C., S. 144—*Money paid under decree by one defendant—Plaintiff pursuing his appeal against another defendant and succeeding—First defendant while withdrawing money is entitled to interest thereon.*

Plaintiff having got a decree against the 1st and 2nd defendants in the suit for the return of the earnest money and damages for breach of contract proceeded to appeal on the ground that he was entitled to specific performance of the contract against the defendant No. 3. Pending the appeal the 1st defendant paid into Court, the amount which had been awarded against defendants Nos. 1 and 2. The plaintiff continued the appeal and was successful. On an application by defendants 1 and 2, for restitution and claiming interest on the money which remained in Court.

Held, that plaintiff could not resist the claim on the ground that he acquired no benefit from the money.

[P. 314, C. 1, 2]

Ratanlal Ranchhoddas and V. Divatia—for Appellant.

G. N. Thakor, with *R. J. Thakor*—for Respondent.

Macleod, C. J.—The facts are correctly stated in the judgment of the lower Court. The plaintiff having got a decree against the 1st and the 2nd defendants in the suit for the return of the earnest money and damages for breach of contract proceeded to appeal on the ground that he

was entitled to specific performance of the contract against the defendant No. 3. Pending the appeal the 1st defendant paid into Court, as he was entitled to do, the amount which had been awarded against defendants Nos. 1 and 2. The plaintiff continued the appeal and was successful. Consequently these defendants were entitled to get their money back.

So defendants Nos. 1 and 2 filed Darkhast No. 283 of 1922 for restitution, claiming interest on the money which remained in Court, until the plaintiff's Darkhast No. 172 of 1923. The plaintiff says that he acquired no benefit from the money which had been paid into Court, and therefore he was not liable to pay interest demanded by the defendant No. 1. The learned trial Judge said :—

“ Then it is said that no benefit was derived by the plaintiff by the deposit of the decretal money in Court. The answer to this lies on its very surface, for the principle of the doctrine of restitution is that on the reversal of the judgment the law raises an obligation on the party to the record who received the benefit of the erroneous judgment to make restitution to the other party for what he had lost. *I. L. R. 23 Mad. 306.*

“ It was the pleasure of the plaintiff not to take the available money in pursuance of the decree of the trial Court, but this act has caused loss to defendant, and when the Hon'ble High Court set aside the claim for damages, the parties need to be relegated to their original position.

“ Under the circumstances, I think that it was incumbent on the plaintiff, when informed, to take the money, otherwise the amount was lying in Court at his risk, entailing all the natural consequences in the event of a refund or restitution, as provided for under S. 144 for the wrongful loss thus caused by him to the defendant. In any case by filing Darkhast 172 of 1923 on 10th March 1923, which is dismissed this day, he caused the detention of Rs. 3,831-4-0 in order to secure satisfaction of his Darkhast claim.”

We think the case for the defendants might have been put rather stronger, because the plaintiff retained the benefit of the payment into Court made by the defendants during the whole time when the appeal was pending, and even when the appeal had been heard he sought to take advantage in the Darkhast referred to of the payment into Court. He cannot

therefore now be allowed to say that he derived no benefit from that payment. But even if he derived no benefit, still, the onus lay upon him, if he wanted to be relieved of the risk of any such application as has now been made, to give notice to the defendant to take his money out. He has had the advantage of the money lying in Court until the appeal was heard, and that would be a sufficient advantage to enable defendant No. 1 to succeed. The appeal, therefore, is dismissed with costs.

Appeal dismissed.

1925 BOMBAY 314

MACLEOD, C. J. AND COYAJEE, J.

Jamshedji Naoroji Gamadia — Defendant—Appellant.

v.

Maganlal Bankeylal & Co.—Plaintiffs—Respondents.

O. C. J. Appeal No. 95 of 1924 and Suit No. 2358 of 1922, Decided on 27th February, 1925, from the decision of Kemp J.

(a) *Contract Act, S. 178, Proviso*—“ *Fraud* ” in the proviso implies total absence of consent.

The use of the term “ fraud ” in juxtaposition to offence in proviso to S. 178 would seem to indicate that it is confined to the substantive wrong of deceit. If possession of goods obtained under a contract voidable on the ground of fraud, is possession obtained by fraud a pledge by the possessor could be invalid even before the rescission of the contract although an out and out sale would be valid under S. 108. The obtaining of goods or documents by fraud as contemplated by S. 178 proviso, must mean obtaining possession by such a trick or fraud as excludes real consent and therefore cannot be the foundation of any contract. [P 317, C 2; P 318, C 1]

(b) *Contract Act, S. 178*—“ *Goods* ” includes “ share certificates.”

The term “ goods ” used in S. 178 is sufficiently wide to include share certificates. [P. 318, C. 1]

Kanga and Khergamvalla — for Appellant.

Thomas Strangman and Kania — for Respondents.

Macleod, C. J.—The plaintiffs filed this suit seeking to recover the sum of Rs. 26,671-9-0 from the first defendant, and praying for a declaration that the pledge of the shares mentioned in Ex. E to the plaint was binding on the second defendant, and that the second defendant had no right to prohibit the transfer of the said shares to the name of the plaintiffs. They also prayed that they might be authorised to sell the shares mentioned in Ex. D and appropriate the net proceeds

towards part satisfaction of the decree to be passed in their favour.

Plaintiffs alleged that the first defendant had borrowed certain amounts from them on security of certain shares. On April 12, 1921, it was found that Rs. 38,000 were due by the first defendant and the first defendant passed a writing to the plaintiffs whereby he promised to pay the plaintiffs the said sum of Rs. 38,000 on demand with interest, and gave details of the shares which were to remain as security. Thereafter the plaintiffs had received a certain amount of interest on certain shares and also sold certain shares under the instructions of the first defendant. On making up the account the amount of Rs. 26,671-9-0 was found due to the plaintiffs, against which the plaintiffs had in their possession the shares mentioned in Ex. D to the plaint, out of which fourteen shares of the Emperor Edward Mills and one share of the Nagpur Mills stood in the name of the second defendant. The plaintiffs had in their possession the share certificates and transfer forms signed by the second defendant, who had given notice to the companies concerned not to transfer the shares to any other person. The first defendant had failed to pay the sum of Rs. 26,671-9-0, and hence the suit was filed claiming the relief abovementioned.

The first defendant filed a written statement asking for an account but at the hearing he admitted the claim.

The second defendant in his written statement alleged that in April 1920 the first defendant had induced him to join the first defendant in cotton business as financing partner, representing that he only owed Rs. 16,000 on the transaction of the firm of Framroze Boga & Co. of which he had been a partner and which had been dissolved. Relying on the representation the second defendant agreed to become a partner with the first defendant upon the terms of two writings dated April 24, 1920, and as the second defendant had not sufficient cash it was arranged that he should hand over to the first defendant certain shares with blank transfers signed by him on which the first defendant should be at liberty to borrow money for the purposes of the said business. The aggregate value of the shares was Rs. 2,03,889 and amongst them were fourteen shares of the Emperor Edward Mills and one share of the Nagpur Mills. Thereafter

the second defendant discovered that the first defendant's liabilities in the firm of Framroze Boga and Co. far exceeded Rs. 16,000 and that he had employed the money raised on the security of the said shares of the second defendant in paying off these liabilities. When the second defendant threatened the first defendant with proceedings he executed a writing in favour of the second defendant on May 20, 1920, and on January 28, 1921, executed a mortgage of his property known as the "Bharda Building" to secure repayment of one lakh.

Accordingly the second defendant contended that the first defendant had obtained possession of the said shares by means of an offence and fraud, so that the pledge of the shares in favour of the plaintiffs by the first defendant was not valid and binding on the second defendant.

By way of counter-claim he prayed that the plaintiffs might be ordered to return the shares to him.

The following issues were raised at the trial :—

(1) Whether the suit shares were handed over to the first defendant; under the circumstances mentioned in para 3 of the written statement?

(2) Whether the first defendant obtained possession of the shares by means of an offence and fraud?

(3) Whether the pledge alleged by the plaintiffs was valid and binding on the second defendant?

(4) Whether second defendant was entitled to his counter-claim?

The trial Judge believed the story of the second defendant that the first defendant told him that the liabilities of the old firm amounted to Rs. 16,000 only, but was of the opinion that the second defendant was willing that the money to be raised on pledge of the shares was to be utilised in paying off that liability besides helping to start the new business.

On the second issue he decided that the first defendant obtained the shares by a material misrepresentation of fact, but that as the interests of a *bona fide* pledgee under S. 178 of the Indian Contract Act had intervened, the second defendant could not be placed in the *status quo ante*. Consequently he held that the pledge was valid and binding on the second defendant who was entitled to redeem the shares on payment of the amount for which they were pledged.

A fifth issue had been raised whether the second defendant had not ratified all the acts of the first defendant whereby he was estopped from disputing his liability to the plaintiffs.

The Judge held that the mere fact that he took further security from the first defendant did not amount to a ratification.

The second defendant has appealed.

His main ground of appeal was that the learned Judge should have held that the first defendant had obtained possession of the shares from the appellant by means of an offence or fraud.

He contends that first defendant falsely represented that his old debt was only Rs. 16,000 and that if he had known that the debt amounted to a very much greater sum he would not have given the first defendant the shares to pledge.

What the appellant's case against the first defendant was on January 25, 1921, is made clear from his solicitors' letter of date, Ex. No. 2. After referring to the writing of April 24, 1920, whereby first defendant agreed to execute a mortgage in respect of two of his properties in favour of the second defendant whenever called upon to do so for securing the moneys to be advanced and the fact that second defendant handed over certain shares with blank transfer forms signed by him to enable the first defendant to raise moneys thereon for financing the new business which was to be started, he complains that the moneys so raised were utilised for liquidating the private debts of the first defendant in abuse of the confidence reposed on him by the second defendant without his knowledge and consent so that the new business was never started. On second defendant discovering this he wanted to prosecute the first defendant but he promised to redeem the shares very shortly. As the first defendant had neither redeemed the shares nor executed the mortgage though he had given a fresh writing on August 10, 1920 (Exh. 2), he was called upon to redeem the shares within twenty-four hours or pay the value thereof and in default proceedings either civil or criminal would be taken against him. There is no suggestion in that letter that the original intention was that first defendant should pay off old debts to the extent of Rs. 16,000 out of the amount borrowed on the shares or that second defendant would be entit-

led to give notice to the different companies not to register any transfers.

In his evidence the second defendant said :—

"Framroze Boga was dissolved in April 1920. First defendant proposed I should finance his business after the dissolution. I said I had shares and he could raise money on them to continue a business with me as partner. He said the existing liabilities were Rs. 16,000. My shares were not to go towards that. I would not have given those shares to the first defendant if I had known the liabilities were Rs. 80,000... About August 1920 I came to know he had raised monies on my shares and used them for his own purposes. Then I got the writing of August 10, 1920, executed by first defendant. I also got the first defendant to execute a promissory note for Rs. 1,30,000 on April 30, 1920. On January 28, 1921, I took a second mortgage of the first defendant's Bombay Building. I threatened first defendant with legal proceedings (that was by the letter of January 25, 1921), and he gave me the second mortgage."

On April 24, 1920, the second defendant had given the first defendant a writing Exh. F, authorising him to borrow monies on the shares given to him either by making *badlas* or by over-drawing monies by depositing the said shares with some bank or with shroffs.

Cross-examined about that document he said :—

"I did not understand when I signed it that I was giving first defendant unreserved liberty to pledge. The letter is plain enough. I say it did not authorise first defendant to pledge the shares for any purpose he wanted. First defendant said he had to discharge liability of Rs. 16,000 and he wanted money for that also. The shares of value of those I deposited were to finance to this business also. First defendant got these shares from me by fraud, *viz.*, obtaining them for partnership and thus misapplying them."

It is difficult owing to these contradictory statements to arrive at any satisfactory conclusion whether first defendant was authorised or not to spend out of the monies borrowed on the shares, Rs. 16,000 or any other sum towards discharging his own liabilities. It is true that there is some foundation for the allegation to this effect of the second defendant in the writing Exh. 6 given by the first defendant to

the second defendant on April 24, 1920, but against that there is the statement of the second defendant in his evidence that his shares were not to be used by the first defendant for raising money to pay off his own liabilities. The first defendant said he did not tell the second defendant his private liabilities were Rs. 16,000. Second defendant did not ask, what were the liabilities of the firm the first defendant was continuing. The shares were not given for the new business. They were given so that he could raise margin money. Second defendant had given him shares before by way of margin money. On his own confession the first defendant was guilty of misappropriation of the monies borrowed on the shares. The second defendant's case cannot stand higher than this: "I know the first defendant wished to wind up his old business. He told me the liabilities of that business were Rs. 16,000 and I was willing that monies should be raised to pay off those liabilities and provided the capital for our partnership business. If I had known that first defendant's liabilities were Rs. 80,000 I would not have consented to start a new business with him, and I would not have handed over the shares."

But in my opinion the case set up in Exh. 2 is the right one and that the second defendant gave the shares to the first defendant to raise money thereon for the new business.

The question, therefore, is, as propounded by the Advocate General whether the persons who advanced money to the first defendant on the shares standing in the name of the second defendant were bound to make inquiries as to the first defendant's title to deal with the shares, or whether the second defendant by putting into the hands of the first defendant his shares with blank transfers signed by him was estopped from disputing the title of a holder of the shares and transfers who received them in good faith from the first defendant and advanced money to the first defendant on security of the shares.

It is impossible to lay down any general rule. The answer to the question must depend on the facts of the case. The decision in *France v. Clark* (1) is not of much assistance. France, the registered holder of certain shares, deposited the certificates with Clark as security for £ 150 and gave

him a blank transfer signed by himself. Clark deposited the shares and the transfer with a third party as security for £ 250. The third party filled in the transfer in his own name and sent it in for registration. It was held he had no title against France except to the extent of what was due from France to Clark. A person who without inquiry takes from another an instrument signed in blank by a third party and fills up the blanks cannot even in the case of a negotiable instrument claim the benefit of being a purchaser for value without notice, so as to acquire a greater right than the person from whom he himself received the instrument. Clark was regarded in the light of an equitable mortgagee of the shares. The documents themselves showed that Clark was not the owner and there was no evidence of a mercantile usage that the holders of such documents were treated as having the right to transfer. Blank transfers with share certificates were not negotiable instruments. In this case the first defendant was the agent of the second defendant to raise money on the shares. I cannot agree with the learned Judge when he says the first defendant was a principal. The letter of April 24, 1920, is clearly an authority to the first defendant to raise money on the shares on behalf of the second defendant, the moneys to be utilised according to the terms of Exh. 2 in the business to be started by defendants Nos. 1 and 2 as partners. "The first defendant being authorised to pledge the shares it cannot be said that he had obtained possession of them by means of an offence or fraud. At the most it may be said that he induced the second defendant to negotiate with him with regard to starting a new business by misrepresenting the amount of his liabilities in his old business. Such a misrepresentation would enable the second defendant to avoid the agreement to start the new business and to recover the shares entrusted to the first defendant for the purpose of raising money for that business. The question whether the pledge of the shares before the rescission of the contract would be invalid is considered by Messrs. Pollock and Mulla in their notes to S. 178 of the Indian Contract Act, at p. 639. The authors think that the use of the term "fraud" in juxtaposition to offence would seem to indicate that it is confined to the

(1) [1884] 26 Ch. D. 257=52 L. J. Ch. 382=50 L. T. 1=2 W. R. 466.

substantive wrong of deceit. If possession of goods obtained under a contract voidable on the ground of fraud is possession obtained by fraud a pledge by the possessor could be invalid even before the rescission of the contract although an out and out sale would be valid under S. 108. I agree with their conclusion that it was not the intention of the legislature to depart from the common law, and that the obtaining of goods or documents by fraud of which the proviso to S. 178 speaks must mean obtaining possession by such a trick or fraud as excludes real consent and therefore cannot be the foundation of any contract. The fraud if any committed by the first defendant was not committed in obtaining possession of the shares but in his disposition of the moneys obtained by pledging them.

Even assuming that the pledgee on being asked to lend money on the shares with blank transfers standing in the name of the second defendant was put on inquiry with regard to the title of the first defendant, he would have been shown the letter of authority signed by the second defendant.

I think, therefore, the decision of the learned Judge was right and that the appeal should be dismissed with costs.

Coyajee, J.—I agree in holding that the pledge of the share certificates created by the first defendant in favour of the plaintiffs is valid: S. 178, Indian Contract Act. The term "goods" used in that section is very wide (S. 76 of the said Act), sufficiently wide to include share certificates: *Fazal v. Mangaldas* (2). In my opinion the evidence in this case, which is fully discussed in the judgment of the learned Chief Justice, makes it clear that the first defendant had not obtained those certificates from the second defendant by means of "fraud" within the meaning of that expression as used in the proviso to S. 178. The proviso, it would seem, does not exclude from the operation of the section the case of goods obtained under a contract voidable on the ground of fraud. For it would be anomalous that although a person who has obtained possession of goods under a contract voidable at the option of the other party to it can transfer full ownership of these goods before the contract is rescinded (exception 3 to

S. 108), he cannot make a valid pledge at all of the same goods.

In this case the second defendant handed over the share certificates and transfer forms duly signed to the first defendant on April 24, 1920. On that day two documents (Exht. E and Ex. No. 6) were exchanged between them. The one passed by the second defendant gave the first defendant authority to raise moneys on the pledge of those certificates in language both plain and wide. It says:—"I authorise him and give my consent to borrow monies either by making Badlas or by overdrawing monies by depositing the said shares with some Bank or big shroffs." The material statements in the other document are:—"With regard to the cotton brokerage business which I have been carrying on...in the name of Messrs. Framroze Boga and Company and with regard to the current business of the said brokerage which I have taken upon myself in the said firm you have this day (given) to me certain shares...to enable me to borrow monies thereon...For the monetary assistance which you have given to me I bind myself to make an agreement with you as soon as the accounts of my old customers are settled." The agreement here referred to was a contemplated partnership agreement between the parties. It seems to me that the effect of the evidence of the second defendant read with these documents and with his attorney's letter of January 25, 1921 (Exh. No. 2), is this: Not that the pledge of the share certificates was unauthorised, but that the monies so borrowed were wrongly applied by the first defendant to unauthorised uses. But with this the plaintiffs have no concern. They have acted in good faith in making the loan on the pledge of the share certificates.

In my opinion the decree of the learned Judge is right and this appeal must fail.

Appeal dismissed.

★ 1925 BOMBAY 318

MACLEOD, C. J. AND COYAJEE, J.

Commissioner of Income-Tax—Referor.
v.

Sir Purshottamdas Thakordas—Assessee.

Civil Ref. No. 19 of 1924, Decided on 16th January 1925.

(2) 1922 Com. 303=46 Bom. 489=23 Bom.L.R. 1144.

* *Income-Tax Act S. 4 (3) (VII)—Remuneration obtained for selling cotton of a firm—Assessee himself a cotton merchant—Remuneration is not exempt from tax.*

Remuneration received by a cotton merchant for effecting the sale of cotton belonging to another firm are receipts arising from business and not therefore exempt from taxation.

[P 319, C 2; P 320, C 1]

Kanga and John Bowen—for Referor.
Chimanlal Setalvad, Captain and Vaidya—for Assessee.

Macleod, C. J.—This is a reference under S. 66 (2) of the Indian Income Tax, Act XI of 1922 by the Commissioner of Income-Tax, Bombay Presidency, in the matter of the assessment of the income of Sir Purshottamdas Thakordas, hereafter called the assessee. In his return of income for the purposes of assessment for the year 1923-24, the assessee, while declaring his income from all sources, had made a note as under :—

“ Besides this, I received during Samvat Year 1978 Rs. 1,88,750 as remuneration for winding up the estate of Umar Sobhani which being an extraordinary source of income is not liable to taxation.”

The Income-Tax Officer, however, did not exempt this item from assessment. Thereupon an appeal was lodged before the Assistant Commissioner of Income-Tax who held that this item was rightly taxed. Thereupon the assessee applied for a reference, and the Commissioner of Income Tax has made this reference on the question raised with his opinion thereon.

It seems strange that in a reference of this kind, the Commissioner has not stated what was the profession, vocation or occupation of the assessee. But it has been admitted during the course of the argument that the assessee is a cotton merchant.

In 1922 there was a crisis in the cotton market owing to endeavours made by the firm of Umar Sobhani to corner the market. He had been compelled to keep on making very extensive purchases of cotton in order to maintain prices, but his resources failing it became known to the creditors of the firm, and the market in general, that the firm was not in a position to finance further the huge purchases which had been made so that its failure had become imminent. As a crisis would necessarily result if all its purchases were thrown upon the market, the firm and its creditors looked out for

some one who would command the confidence of themselves and of all concerned to hold the cotton already purchased and sell it to the best advantage. The assessee consented to be appointed under a power of attorney to dispose of all the cotton bales for and on behalf of the firm, to pay what was due to the several Muccadams and Banks, and after deducting out of the nett sale proceeds of the cotton bales all his costs, charges and expenses in respect thereof and his remuneration, to distribute the balance amongst the several persons and firms whose names had already been submitted by the firm of Umar Subhapi to the assessee. Under that power of attorney the assessee sold over 1,00,000 bales which realized about Rs. 1,63,00,000, and received as his remuneration Rs. 1,88,750. It will be noted that in his return of income when claiming exemption for this sum, the assessee refers to it as an extraordinary source of income. He does not refer to it as being income not arising from business or the exercise of his profession, vocation or occupation, which was of a casual and non-recurring nature. However we may take it that the question now before us is whether the receipts in question can be exempted under S. 4 (3) (vii) of the Act, which says : “ Any receipts not being receipts arising from business or the exercise of profession, vocation or occupation, which are of a casual and non-recurring nature, or are not by way of addition to the remuneration of an employee.”

It has been argued for the assessee that these receipts did not arise from business; that “ business ” cannotes continuity ; and that only the receipts arising from a business which is carried on continuously can be assessed. But the Section refers to receipts arising from “ business ” and not to receipts arising from “ a business.” The definition of “ business ” in S. 2 (4) is as follows :—“ Business ” includes any trade, commerce or manufacture or any adventure or concern in the nature of trade, commerce or manufacture, and consequently it is not necessary that the receipts should arise from a business continuously carried on during the year to make them liable to assessment. Even if they arose from a single adventure in business they would be liable to be taxed.

Now it seems clear that the profession or occupation of the assessee being that of a cotton merchant, any receipts arising

from the buying and selling of cotton would be considered as arising from trade or commerce, and the argument that receipts from an extraordinary transaction connected with business, such as the one in this case, which has only occurred owing to exceptional circumstances, and which would not be likely to occur again for many years, can be placed in the same category as receipts entirely disconnected with business or the profession or vocation or occupation of the assessee which might be considered of a casual and non-recurring nature, cannot be accepted.

We are clearly of opinion, therefore, that the remuneration earned by the assessee owing to his having been appointed under a power of attorney by Umar Sobhani to realise the cotton which he had purchased, must be considered as receipts arising from business, and, therefore, to taxation.

There is no need consequently to consider the argument of the commissioner with regard to the meaning of the word "business" or the "casual," or the English authorities which have been cited before us.

The answer to the reference will be that in our opinion the receipts in question are not entitled to be exempted from taxation.

The assessee to pay the costs on the Original Side scale.

Answer accordingly.

1925 BOMBAY 320

MACLEOD, C. J. AND COYAJEE, J.

Narsingacharya Gopalacharya Shurpali—Plaintiff—Appellant.

v.

Tulsabai Rambhat Dandavati and others—Defendants—Respondents.

Second Appeal No. 102 of 1924, Decided on 16th January 1925, from the decision of the Asst. J., Dharwar, in appeal No. 108 of 1921.

Guardians and Wards Act., S. 30—Sale by guardian without Court's permission—Sale is valid till set aside by minor.

Vendee from guardian of a minor, under a sale for which the guardian had not obtained court's permission obtains a good title to the property till the sale is set aside at the instance of the minor. [P. 320, C. 2]

A. G. Desai—for Appellant.

H. B. Gumaste—for Respondents.

Macleod, C. J.—The property in dispute in this suit was a shop at Dharwar belonging to one Narsappa, who died leaving a daughter, the present defendant No. 1, then a minor. A guardian was appointed of her person and property by the District Court in 1904. On April 9, 1913, the guardian sold the shop in suit to the second defendant for Rs. 200, without obtaining permission from the District Court for the sale. In 1915 one Shardabai, who had obtained a decree for maintenance against Narsappa, got the shop attached and sold in execution and one Dyavappa purchased it at the auction sale. Defendant No. 3 later purchased it from Dyavappa. Plaintiff purchased the property from the second defendant in 1919 and brought the suit to recover possession. The trial Court decreed the claim.

The lower appellate Court has dismissed the plaintiff's suit. The learned Judge has misconstrued S. 30 of the Guardians and Wards Act VIII of 1890. The sale by Raghunath in 1913 to the second defendant without the permission of the District Court was voidable at the instance of any other person affected thereby. The only person affected at the time of the unauthorised sale was the minor, and when she came of age, she would be entitled to file a suit to get the unauthorised sale set aside, and as long as she did not do that, and as long as no one obtained a better title to the property, the sale by the guardian continued to be a valid sale. There was nothing left, therefore, at the time of the execution sale of the property which the minor had inherited from her father, which could be conveyed to the auction purchaser. The right of the minor to sue to get the unauthorised sale set aside could neither be attached nor sold, and consequently the purchaser at the auction sale could not oust the purchaser from Raghunath, even although the sale was not sanctioned by the District Court. That was really the only issue in the case, and the issue whether the sale was made for any legal necessity or for the benefit of defendant No. 1's estate was irrelevant. It would only be relevant in a suit by the minor herself.

The appeal will be allowed and the decree of the trial Court restored with costs throughout.

Appeal allowed.

★ ★ 1925 BOMBAY 321

MACLEOD, C. J. AND COYAJEE, J.

Habib Rowji—Defendant—Appellant.

v.

Standard Aluminium & Brass Works, Limited—Plaintiffs—Respondents.

O. C. J. Appeal No. 118 of 1924, and Suit No. 2669 of 1924, Decided on 17th March, 1925.

★ ★ *Limitation Act, Act. 112—Article of company creating liability to pay remaining calls even on forfeiture—Shares of defendant forfeited by a resolution—Cause of action for suit to recover the amount of unpaid calls arises on the date of forfeiture.*

Where Art. 32 of the Company's articles provided "any member whose shares have been forfeited shall, notwithstanding be liable to pay, and shall forthwith pay to the company all calls, instalments, interest and expenses owing upon or in respect of such shares at the time of the forfeiture together with interest thereon, from the time of forfeiture until payment, at nine per cent. per annum, and the directors may enforce the payment thereof if they think fit", and defendant, a share-holder did not pay calls and therefore his shares were forfeited and the company filed a suit to recover according to article 32.

Held: that there was a special contract whereby the defendant agreed that in the event of his shares being forfeited he would be liable to pay to the company all the moneys that were due by him for allotment, calls and further calls made on the shares allotted to him with interest, and the cause of action arose when the company forfeited the shares, and, therefore the suit to recover what was due from the defendant on his shares was within time, if filed within 3 years of the date of forfeiture. [P. 323, C. 2.]

B. J. Desai—for Appellant.*Kanga and Thomas Strangman*—for Respondents.

Macleod, C. J.—The plaintiffs were a joint-stock company incorporated on February 27, 1920, under the provisions of the Indian Companies Act VII of 1913, and having their registered office at Thakurdwar without the Fort. The capital of the company was rupees twenty five lacs divided into 25,000 ordinary shares of the value of Rs. 100 each. On March 31, 1920, the defendant applied for one hundred shares of the said company and duly paid the application money thereon *viz.*, Rs. 1,000. Pursuant to the resolution in that behalf the board of directors of the plaintiff company allotted to the defendant one hundred shares, and the necessary allotment letter duly addressed was duly posted to the defendant. By a resolution passed on July 20, 1920, the board of directors of the plaintiff company made a

1925 B/41 & 42

first call of Rs. 45 per share upon the members of the said company payable on or before August 5, 1920. Due notice of the said resolution was given to the defendant, and he was required to pay the amount of the said call on or before August 5, 1920, at the office of the company. The defendant was further informed that interest at nine per cent. per annum would be charged on the amount of the said call from August 5, 1920, until payment. A further call of Rs. 15 per share payable on or before February 20, 1921, was made by a resolution passed on January 27, 1921, and due notice was given to the defendant. The defendant did not pay the amount due on the allotment or on the calls made by the plaintiff company. Accordingly the directors served a notice on the defendant, dated April 15, 1921, requiring him to pay the same together with interest thereon in accordance with the provisions of the articles of association of the company and stating therein that in the event of non-payment of the said allotment and call money with interest thereon at nine per cent. within twenty days from the date of the notice, that is, on or before May 5, 1921, the directors would forfeit the shares and proceed to recover the unpaid amount. The defendant failed to comply with the requisitions contained in the notice of April 15, 1921, whereupon by a resolution passed on August 3, 1921, by the board of directors the shares held by the defendant were duly forfeited in accordance with the provisions of the articles of association of the company. The plaintiff sought to recover from the defendant the sum of Rs. 5,959-5-0 with interest on Rs. 4,694-12-3 at the rate of nine per cent. per annum from July 29, 1924, till judgment.

The defendant admitted the statements in the plaint but submitted that the suit as against him was barred by the law of limitation in respect not only of the allotment money's but also in respect of the first and second calls, inasmuch as the same became due and payable more than three years before the filing of the suit.

At the hearing issues were raised whether the claims in respect of the allotment money, the first call and the second call respectively were barred by limitation. The learned Judge held that the plaintiffs' claim to recover all the three amounts

was not barred by limitation and passed a decree as prayed.

In appeal it has been argued that that decision is wrong, that the suit was in fact a suit for payment of the allotment money and the calls made by the company on the shares, and that as the suit fell under Article 112 of the Indian Limitation Act the suit was barred. It was also argued that although under Article 32 of the articles of association the company was entitled to enforce payment of the allotment money and the calls in spite of the defendant's shares having been forfeited, the cause of action was the same, and the period of limitation for the suit was the same as on the original cause of action.

Article 32 runs as follows :—

"Any member whose shares have been forfeited shall, notwithstanding be liable to pay, and shall forthwith pay to the company, all calls, instalments, interest and expenses owing upon or in respect of such shares at the time of the forfeiture together with interest thereon, from the time of forfeiture until payment, at nine per cent. per annum, and the directors may enforce the payment thereof if they think fit."

It is admitted that but for the provisions of that article if the shares of any member are forfeited he ceases to be a member of the company in respect of the forfeited shares, and so would no longer be liable to pay to the company all moneys which, at the date of forfeiture, were presently payable by him to the company in respect of the shares. It follows that if a member's shares are forfeited and he ceases to be a member of the company, it is only by virtue of Article 32 that he becomes a debtor to the company for the amount of calls, instalments, interest and expenses due at the time of forfeiture, and it can be said that on that account a new cause of action arises under that special contract between him and the company. The question has not arisen in any reported case as to when the period of limitation begins to run for a suit by a company against a late member for money in respect of calls, instalments and expenses which were due from him at the time his shares were forfeited. The learned Judge has relied upon the decision in *Stocken Ex parte* (1). In that case by the articles of asso-

ciation of the company overdue calls were to carry interest at twenty-five per cent. and, by clause 50, it was provided that the forfeiture of a share should involve the extinction at the time of the forfeiture of all interest in, and all claims and demands against, the company in respect of the share, and all other rights incident to the share but that the shareholder should, notwithstanding be liable, "to pay to the company all calls owing on such share at the time of such forfeiture." An action was brought by the company to recover from Stocken the amount due on the shares belonging to him which had been forfeited under clause 50. The company having gone into liquidation after forfeiture Stocken successfully resisted being placed on the list of contributories, but then received a notice in writing, calling upon him to pay to the official liquidator the amount of the call which was due at the time of forfeiture, "and interest thereon, calculated according to the articles of association and the notice of call issued to the shareholders." The question then was whether Stocken was bound to pay not only the amount due to the company but also "interest thereon." The Master of Rolls decided that no interest was payable. In appeal Lord Cairns, C. J. said (p. 414) :

"I think that the 50th clause of the articles of association, whether it be called a penal clause or not, must receive a strict construction, and that the rights of the parties on one side and the other must depend upon its construction...But whether that be so or not, the construction of that clause, as it seems to me, is reasonably clear. The first part runs thus :—'The forfeiture of any share shall involve the extinction at the time of the forfeiture of all interest in and all claims and demands against the company in respect of the shares and all other rights incident to the share.' Now suppose the clause had stopped there, and there had been nothing more in the articles. I apprehend that clearly no action could, after forfeiture, have been maintained for the recovery of the calls previously due, and that for two reasons. First, I think so in consequence of the words used, namely, that all rights incident to the share are extinguished, which words cannot, in my opinion, be confined to rights against the Company, but must extend to all rights incident to the share. In addi-

(1) [1868] 3 Ch. 412=37 L. J., Ch. 230=17 L. T. 554=16 W. R. 322.

tion to that, I am strongly disposed to think that the mere fact of a duly authorised forfeiture of shares without anything in the articles defining the effect of forfeiture, would of itself, in the very nature of things, render any proceedings at law for past calls incompetent, because such proceedings must, I apprehend, be on the footing that the person sued was a shareholder in the company; and if his interest in the company had been destroyed, it is by no means clear that the action could be maintained. The following part of the 50th clause shows that the construction which I have put upon the first part is the construction put on it by the framer of the articles; for he evidently thought that if he stopped there any right to proceed for calls would be gone, and he therefore introduces a provision which seems to me to be in substance and in words the creation of a new right."

Accordingly it was held that no interest was payable, as no demand had been made for payment with interest after forfeiture on the sum payable under the forfeiture clause. It simply gave an independent right to recover after forfeiture the sum due at the date of forfeiture. That was the sum which appeared to the Court, could be recovered and nothing beyond that.

A reference has also been made to the case of *Ladies Dress Association v. Pulbrook*, (2) in which the defendant was sued after the company went into liquidation for the unpaid calls due by him, and it was held that, "notwithstanding the provisions of S. 38 of the Companies Act, 1882, sub-Ss. 1, and 3, the action was maintainable, inasmuch as the defendant was liable not as a contributory, but as a debtor to the company."

By analogy a reference may also be made to S. 61 of the Indian Companies Act (VI of 1882) which makes it clear that when a company has gone into liquidation "every present and past member of such company shall be liable to contribute to the assets of the company an amount sufficient for payment of the debts and liabilities of the company, and the costs, charges and expenses of the winding up." And under sub-clause (d); "In the case of a company limited by shares, no contribution shall be required from any member exceeding the amount, if any, unpaid

on the shares in respect of which he is liable as a present or past member." So that when a company goes into liquidation, although as against the members the company's right to recover the money due on the calls may be barred, the members of the company are liable to contribute to the assets of the company to the extent of the amount unpaid on their shares in order that the debts and liabilities of the company should be paid. It seems to me, therefore, that by Article 32 of the Articles of Association, there was a special contract whereby the defendant agreed that in the event of his shares being forfeited he would be liable to pay to the company all the moneys that were due by him for allotment, calls and further calls made on the shares allotted to him with interest, and it was on that contract that the plaintiff's were suing. The cause of action then arose on August 3, 1921, when the company forfeited the shares, and, therefore, the suit to recover what was due from the defendant on his shares was within time. The appeal, therefore, fails and must be dismissed with costs.

Coyajee, J.—I concur. The foundation of the suit is the special contract evidenced by Article 32 of the plaintiff company's Articles. On forfeiture of his shares, the defendant ceased to be a member, and the company could not thereafter sue him for past calls. But although his liability to pay such calls came to an end, he incurred, under the terms of Article 32, a fresh liability to "forthwith pay to the company all calls, instalments, interest and expenses owing upon or in respect of such shares at the time of the forfeiture, together with interest thereon from the time of forfeiture until payment." This in my opinion, was a new obligation giving the company a fresh cause of action against the defendant; and the period of limitation for a suit to enforce this new obligation began to run from the time the shares were forfeited. In this case, the plaintiff company exercised the power of forfeiture on August 3, 1921, and the suit having been instituted on July 31, 1924, is not barred by limitation.

Appeal dismissed.

(2) [1903] 2 Q. B. 376=39 L. J; Q. B. 705=49 W. R. 6=7 Manson 465.

★ 1925 BOMBAY 324

MACLEOD, C. J. AND COYAJEE, J.

Mahadev Vitho Patil and others—
Plaintiffs—Appellants.

v.

Ganoo Changoo Patil — Defendant—
Respondent.

Second Appeal No. 121 of 1924, Decided on 30th January 1925, from the decision of the Joint Judge, Thana, Appeal No. 137 of 1922.

★ *Contract Act., S. 253—Partner failing to carry out duties imposed on him—Suit for dissolution—Partner is not liable for probable loss.*

One partner is not liable, in a suit for accounts upon a dissolution of partnership, for the probable loss sustained by the firm owing to the neglect or failure of one partner to carry out the duties imposed upon him by the partnership agreement to the prejudice of the firm's business.

[P. 324, C. 1, 2.]

*T. N. Walavalkar—*for Appellants.*P. B. Shingne—*for Respondent.

Macleod, C. J.—This was a suit for accounts of a partnership entered into between the parties to the suit to ply a *machawa* for hire. The *machawa* itself has been sold, and the dispute now ranges about some minor matters in the account. The trial Court came to a decision on those matters. It is contained in what is called a preliminary decree at page 11 of the print. That was not a real preliminary decree, as all the questions in dispute were actually decided, and nothing remained to be done except to make the necessary calculations to give effect to the Court's findings.

The defendant appealed and the Court came to a different conclusion on certain items of the account, and passed a decree accordingly.

The plaintiffs have appealed, and the first ground on which they rely is that the lower appellate Court had no jurisdiction to interfere with the preliminary decree in an appeal from the final decree. As a matter of fact the decree was not a preliminary decree although the Judge called it so. Consequently that ground of appeal cannot be supported.

An objection is taken to the lower appellate Court's disallowing an item of Rs. 225 to the plaintiffs on the ground that one partner is not liable in a suit for accounts upon a dissolution of partnership for the probable loss sustained by the firm owing to the neglect or failure of one partner to carry out the duties imposed upon

him by the partnership agreement to the prejudice of the firm's business.

It was contended that the defendant was negligent in not plying the boat for freight. The appellate Judge has considered that, and has come to the conclusion that there was no negligence on which an action could be founded and so the plaintiffs would not be entitled to recover damages for negligence against their partner.

We have been referred to Lindley on Partnership, (9th Edn.), page 472. The passage runs:—

"Before the Partnership Act, 1890, was passed, if a partner was guilty of a breach of his duty to the firm, and loss resulted therefrom, such loss fell on him alone. As was said by the Court in *Bury v. Allen* (1), 'Suppose the case of an act of fraud, or culpable negligence, or wilful default by a partner during the partnership to the damage of its property or interests, in breach of his duty to the partnership, whether at law compellable or not compellable, he is certainly in equity compellable to compensate or indemnify the partnership in this respect.'"

But it cannot be said that the defendant has been guilty of fraud, culpable negligence, or wilful default.

Reference was also made to *Thomas v. Atherton* (2). But in that case the managing partner of a mine carried on the workings beyond the boundary. An action was brought by the adjoining owner against the managing partner, and the proceedings before the arbitrators ended in an order against him. In a suit brought by the managing partner against the other partners for contribution, it was held that the other partners were not liable.

That would be an entirely different question from the one now argued before us, namely, that the defendant, owing to his not having plied the boat for freight, would be liable to bring into account the freight that could have been earned as contended for by the plaintiffs.

We think, therefore, that the decision was right and the appeal must be dismissed with costs. The cross-objections are dismissed with costs.

Appeal dismissed.

(1) [1845] 1 Coll. 589.

(2) [1878] 10 Ch. D. 185=48 L. J. Ch. 370=40 L. T. 77.

1925 BOMBAY 325

MACLEOD, C. J. AND COYAJEE, J.

Sundarabai Vitthal Deshpande and another—Defendants—Appellants:

v.

Lakshman Ramchandra Deshpande—Plaintiff—Respondent.

Second Appeal No. 120 of 1924, Decided on 29th January, 1925, from the decision of the Dt. Judge, Belagum, in Appeal No. 120 of 1924.

Bombay Hereditary Offices Act (3 of 1874) S. 5—Mortgagee from Watandar is liable to pay mesne profits if he retains possession after mortgagor's death.

Mortgagee from a watandar is liable to pay the mesne profits after the original mortgagor's death for the period between the death of the mortgagor and the time when his successor to the watan obtains possession. 44 Bom. 500 Dist. 24 Bom. 555 (P. C.) Foll. [P. 325, C. 2]

A. G. Desai—for Appellants.

D. R. Manerikar—for Respondent.

Macleod, C. J.—This action was instituted by the plaintiff to recover mesne profits of certain watan land for three years 1918–1920, with interest from October 21, 1918, the date of death of plaintiff's father who had mortgaged that watan property in 1908. The land was restored to the plaintiff by the revenue authorities in 1921 on the ground that plaintiff's father was not competent, to alienate watan land beyond the term of his life. The trial Court dismissed the plaintiff's suit on the ground that the possession of the mortgagee, after the death of the original watandar-mortgagor, was not wrongful; and that although under S. 6 of the Bombay Hereditary Offices Act, 1874, the mortgage itself did not subsist, the personal remedy did not cease.

In appeal the plaintiff's claim was decreed for two years 1919–1920. The District Judge relied upon the decision in *Krishnaji Sakharam v. Kashim*, (1) where it was held that the mortgage of the watan property came to an end on the death of the mortgagor. Thereafter the possession of the mortgagee became that of a trespasser. In that case the mortgagee sued to recover the mortgage amount with interest relying on a personal covenant in the deed. It was held that the covenant in the mortgage only meant

that the mortgagor was personally liable to pay the amount without any hindrance in his life-time. The covenant did not refer in terms to his heirs and successors. The receipt of rent after 1901 could not be deemed to be payment for the purposes of S. 20 of the Indian Limitation Act, 1908, and, therefore, the claim was barred by limitation. The question, however, whether the mortgagee from a watandar is liable to pay the mesne profits after the original mortgagor's death for the period between the death of the mortgagor and the time when his successor to the watan obtains possession, does not seem to have been clearly decided in any case to which we have been referred.

In *Padupa v. Swamirao* (2) it was held that an alienation by way of mortgage of watan property, or any part of it, executed when Regulation XVI of 1827 was yet in force, had no operation beyond the life of the watandar who mortgaged. The mortgage was in its inception void against the heir of the watandar, and had not become validated against the heir by reason of the repeal of the section in Regulation XVI of 1827, relating to this subject, by Bombay Act III of 1874. The Subordinate Judge passed a decree that the plaintiff should recover possession and that the investigation of the mesne profits should be reserved. That decision was eventually confirmed by their lordships of the Privy Council. The only question argued before their lordships was whether the mortgage itself was void, and there does not appear to have been any argument on the question whether the successor to the watan could recover the mesne profits from the date of the death of the mortgagor. It may be taken, however, that the order of the Subordinate Judge with regard to mesne profits was approved. The question whether the successor to the watan can be sued on the personal covenant in the mortgage of his predecessor is an entirely different one. The trial Judge appears to have been led away by the argument which has been again renewed in this Court that because his father, the mortgagor, was liable to be sued on his personal covenant, the plaintiff was also liable to be sued, so that he could not seek to recover the mesne profits. That question is irrelevant to the present suit

(1) [1919] 44 Bom. 500=57 L. C. 76=22 Bom. L. R. 385.

(2) [1900] 24 Bom. 556=27 L. A. 86=2 Bom. L. R. 548=4 O.W.N. 517 (P. C.)

We think that it is clear that the plaintiff was entitled to succeed, and consequently the appeal will be dismissed with costs.

Appeal dismissed.

★ 1925 BOMBAY 326

MACLEOD, C. J. AND CRUMP, J.

Gulabrao Yeshwant Harphale — Appellant.

v.

Magan Ghelabhai Gujarathi—Respondent.

Second Appeal No. 237 of 1924, Decided on 5th January, 1925, from the decision of the Dt. J., Poona, in Appeal No. 231 of 1922.

★ (a) *Civil P.C., (1908) S. 48—Decree passed before new Code came into force—Section applies.*

S. 48 of the Civil P. C., has retrospective effect, and governs an application for the execution of a mortgage decree passed before the new Code came into force. 22 *Bom. L. R.* 1420 *Rel. on.*

[P. 326, C. 2]

(b) *Execution of decree—Instalment decree ceases to be so, on default.*

Where a decree payable by instalments provided for full payment on default.

Held, that such decree ceased to be instalment decree on a default taking place. [P. 326, C. 2]

(c) *Civil P. C., S. 48—Instalment decree ceasing to be so on default — Court cannot restore decree to original status.*

Court cannot order at the instance of the judgment-creditor that a decree which has ceased to be an instalment decree should be restored to its previous status so as to prevent time from running against him. 1922 *Bom.* 170 *Dist.*

[P. 326, C. 2]

K. V. Joshi—for Appellant.

K. H. Kelkar—for Respondent.

Macleod, C. J.—In this case a decree was passed against the present appellants in 1899 in a suit for sale of certain mortgaged property. Redemption was allowed on payment of Rs. 2,000 by annual instalments of Rs. 50 and it was directed that if there was a default in payment of two instalments, the plaintiff was entitled to take out execution for the whole amount. It is admitted that there was default in conforming to the terms of the decree so far back as 1901. The plaintiff had then the right to execute his decree for the whole amount, and necessarily time was running against the plaintiff from that date with regard to that right. It seems

that thereafter various attempts were made by the plaintiff to recover the decretal amount by Darkhasts, and it is not suggested that the present Darkhast was filed more than three years after the date of the last Darkhast. Accordingly it was held by the Subordinate Judge and also by the District Judge in appeal that the Darkhast was in time.

It was argued before us that as this application for execution was made more than twelve years after 1901 it was barred under S. 48 (i) (b) of the Civil Procedure Code. Against that view the decision in *Kaunsilla v. Ishri Singh* (1) was relied upon. But that decision has been dissented from by this Court in *Gopaldas v. Tribhovan* (2) where it was held in a considered judgment that S. 48 of the Civil Procedure Code has retrospective effect, and governs an application for the execution of a mortgage decree passed before that Code came into force. Hence such an application if presented twelve years after the date of the decree was barred.

Therefore, the application to execute the decree for the whole amount cannot be within time, since time began to run against the decree-holder in 1901. He cannot be allowed to continue to execute for the instalments as they fall due, as on default the decree was no longer an instalment decree.

The respondent relies upon the case of *Narsimha v. Balvant* (3). In that case the judgment-debtor applied for an extension of time to pay one of the instalments, and this Court held that in cases of default of payment of instalment decrees the Court in Equity has power to relieve the debtor from the consequences of his default. But we do not think we can order at the instance of the judgment-creditor that a decree which has ceased to be an instalment decree should be restored to its previous status so as to prevent time from running against him.

We, therefore, think that the appeal should be allowed and the Darkhast dismissed with costs throughout.

Appeal allowed.

(1) [1910] 32 All. 499=6 I. C. 188=7 A. L. J. 420.

(2) [1920] 45 Bom. 365=59 I. C. 790=22 Bom. L.R. 1420.

(3) 1922 Bom. 170=46 Bom. 463=23 Bom. L. R. 1238.

★ 1925 BOMBAY 327

MACLEOD, C. J. AND COYAJEE, J.

Emperor—Appellant.

v.

Krishtappa Khandappa—Accused.

Criminal Appeal No. 369 of 1924, Decided on 28th January, 1925, from an order of the Asst. S. J. Dharwar.

★ *Penal Code, S. 29—Letters imprinted on trees for distinction and identification are 'document'*

Letters imprinted on the trees and intended to be evidence that the trees had been passed by the forest Ranger, and so could be removed from the place where they were lying in the forest are a 'document' within the meaning of S. 29.

[P 329, C 1]

S. S. Patkar—for the Crown

V. V. Bhadkamkar and H. B. Gumaste—for Accused.

Macleod, C. J.—Six persons were charged before the Sessions Judge of Dharwar with having conspired and abetted each other in the felling and removal of twenty sandalwood trees from a Government reserved forest, and further with intending to commit forgery in respect of the trees by impressing thereon certain marks. Accused No. 4 was charged with possession of a counterfeit stamp for the purpose of impressing those marks. All the accused were acquitted. The Government have appealed with regard to the order of acquittal in favour of accused Nos. 1 to 4. We think that the record shows conclusively that accused Nos. 1 to 3 were concerned in the removal of sandalwood trees from Coupes Nos. 2 to 4 of Block No. 15 in the reserved forest of Shirgod, and removing them to the adjoining Malki No. 41. We do not understand on what material the Assistant Sessions Judge came to the conclusion that the evidence against those accused failed to prove their guilt. Admittedly accused Nos. 1 to 3 having cut down the trees without permission, we fail to see who else would go to remove the logs except these accused. On the night of September 12, from the noise that was heard, Ismail, the Beat Guard, and his party, who were lying in ambush to catch the thieves, felt sure that logs were being removed from the reserved forest, and when the removal was complete they came out from their ambush and discovered accused Nos. 1 to 3. The Judge says: "I cannot believe that part of the prosecution story which relates to

the rounding up of accused Nos. 1 to 3. The story is grotesque in its details' very improbable and the witnesses contradict each other in material particulars." There can be no doubt that these three persons were caught in the forest coupe, from which the logs were removed, and there can be no justification for suggesting that the logs had been carried off by some other persons. These three accused, however, were only poor persons who had been employed by others who had purchased the right to cut trees from Government. Accused No. 5 and 6 who had purchased the trees in the Malki No. 41, on September 9, reported to the Forest Officer that they had sold their right to accused No. 4. Accused Nos. 1-3 told the Forest Officer that they had instructions from accused Nos. 5 and 6 to cut down trees and remove them and they expected accused Nos. 5 and 6 to arrive on the scene shortly. Accused Nos. 1 and 2 volunteered to go and fetch them with the stamp. About 2 P. M. on September 13, accused No. 1 came back with accused No. 4. The Forest party was again lying in ambush. Accused No. 1 pointed the logs to accused No. 4 saying that they were ready for stamping. Accused No. 4 replied that the stamp belonged to accused No. 5 who was soon coming and he would then stamp the logs. Accused No. 4 then, as he was walking about, saw Ismail and Ramchandra (also called Havaladar), and cried out their names. The hiding party then emerged and caught accused No. 4. He was questioned by the Havaladar, told that he must have the stamp, and threatened with a search of his person. Accused No. 4 then of his own accord produced the stamp from a cloth round his waist. The Judge has believed that accused No. 4 produced the stamp but considered that he was not guilty of any offence under the Indian Penal Code. We are fully satisfied that accused Nos. 5 and 6 had originally employed accused Nos. 1 to 3 to cut down trees from the Government portion of the forest, and that the intention was to carry the wood into Malki No. 41, where accused Nos. 5 and 6 had got the right to cut. Application would then have been made to remove these trees, as if they had been cut in Malki No. 41.

The only question is whether possession of the counterfeit seal, plate or other ins-

trument for making an impression, renders accused No. 4, liable as having committed an offence under S. 473, Indian Penal Code, in that he had made or counterfeited a seal, plate or other instrument for making an impression intending that the same should be used for the purpose of committing any forgery, which would be punishable under any section of Chapter 18 other other than S. 467, or with such intent had in his possession any seal, plate or other instrument, knowing the same to be counterfeit. It has been contended that as forgery implies the making of a false document, a person counterfeiting marks on a tree would not be making a false document within the meaning S. 464, and this contention found favour with the Assistant Sessions Judge who relied upon the decision in *Empress v. Riasat Ali* (1). It seems to us that the learned Chief Justice for the purposes of that particular decision did not consider the provisions of S. 29, Indian Penal Code. The question here is whether a document must necessarily be something which is signed, sealed or executed. S. 29 says "the word 'document' denotes any matter expressed or described upon any substance by means of letters, figures or marks, or by more than one of these means, intended to be used...as evidence of that matter." Explanation 2 says: "Whatever is expressed by means of letters, figures or marks as explained by mercantile or other usage, shall be deemed to be expressed by such letters, figures or marks within the meaning of this section although the same may not be actually expressed."

Now these letters when imprinted on the trees were intended to be evidence that the trees had been passed by the Ranger, and so could be removed from the place where they were lying in the forest. The letters, therefore, imprinted on the trees would be a document within the meaning of S. 29 of the Indian Penal Code.

Then it is suggested that accused No. 4 could not have had the intention of making the imprint intending to use the same for the purpose of forgery. But on the evidence it seems perfectly clear to us that when accused No. 4 came where the trees were lying with this particular counterfeit mark in his possession, he

must be taken to have had the intention of using it for the purpose of imprinting the trees with false marks.

It seems to us, therefore, that the order of acquittal in respect of accused Nos. 1 to 4 was wrong. Accused Nos. 1 to 3 must be convicted under S. 379 and accused No. 4 under S. 473, Indian Penal Code. We do not think that any exemplary punishment is called for against accused Nos. 1 to 3. They were only persons who were employed as labourers to cut and remove the wood. We, therefore, discharge them under S. 562, Criminal Procedure Code. The case against accused No. 4 is more serious. We think that a sentence of six months' rigorous imprisonment should be passed on accused No. 4.

Appeal allowed.

1925 BOMBAY 328

MACLEOD, C. J. AND COYAJEE, J.

Basayya Ayappa Sarghnachayar—Plaintiff—Appellant.

v.

Allayya Maharudrayyu Ganachari—Defendant—Respondent.

Second Appeal No. 101 of 1924, Decided on 15th January, 1925, from the decision of the Dt. J. Bijapur, in Appeal No. 8 of 1923.

Civil P.C., O. 17, Rr. 2 and 3—Failure of plaintiff to appear at adjourned hearing—Court should proceed under R. 2—Trial Court and not the Appellate Court can consider if plaintiff had good reasons for non-appearance.

If a party fails to appear at an adjourned hearing, the proper order for the trial Court to pass is one under R. 2 and not under rule 3 but if it proceeds under R. 3 and dismisses the suit on merits, it is the trial Court and not the appellate Court which can consider if the plaintiff had sufficient cause for non-appearance. [P 329, C 1]

Nilkant Atmaram—for Appellant.

H. R. Gumaste—for Respondent.

Macleod, C.J.—This suit was originally fixed before the trial Court for hearing on November 2, 1922. On that date the plaintiff's pleader asked for an adjournment undertaking to produce his witnesses without summonses. The Court granted an adjournment till November 30, 1922. On November 30, the case was called on but the plaintiff was absent. The Court instead of making an order under Order XVII, rule 2, proceeded under rule 3 to decide the suit and rejected the plaintiff's claim with costs.

(1) [1881] 7 Cal. 352=8 C. L. R. 572.

On appeal the District Judge was of opinion that that order was wrong, but he considered the appeal before him on its merits holding that the plaintiff had not shown sufficient cause for his non-attendance on November 30. But if the proper order had been made by the trial Judge under Order XVII, rule 2, it would be the trial Judge who would have to decide on the application to restore the suit to the board, whether the plaintiff had sufficient cause for his non-attendance; so we do not think that the decision of the District Judge on that question is one which was competent. As the initial order was wrong, the appellant was entitled to be heard on the question of his non-appearance by the trial Court. We think, therefore, that the suit should be restored to the board on the appellant's first paying all costs which have been incurred by the 1st defendant up to date.

These costs should be paid within one month after the proceedings have been returned to the trial Court.

Appeal allowed.

1925 BOMBAY 329

CRUMP, J.

Mahomed Esmail Fazla—In re.

Insolvency Petition No. 143 of 1924,
Decided on 23rd January, 1924.

*Presidency Insolvency Act, S. 36 cls. 4 & 5—
Clauses do not apply to cases where insolvent alleges
fraud practised on him by mortgagee.*

S. 36 Cls. (4) and (5) were intended to prove a summary procedure for ordering payments of debts due and delivery of property where there is no dispute. But the procedure under that section is inappropriate in the case of disputes arising out of allegations by insolvent that he was compelled to execute mortgages on his property by fraud, undue influence and such other measures. [P 329 C 2.]

The Official Assignee in person.

Mulla—for Insolvent.

Judgment.—Mahomed Imail Fazla was adjudicated insolvent on February 1, 1924. On September 27, 1924, the Official Assignee applied to the Court for an order for the examination of five persons under S. 36 of the Presidency Towns Insolvency Act. On December, 16, 1924, the three petitioners, being three of these persons, obtained a rule nisi calling upon the Official Assignee to show cause why the order for their examination should not

be vacated. The rule was argued before me on January 20, 1925, and I reserved my judgment.

The nature of the controversy between the parties can be gathered from the affidavits. The insolvent in his affidavit of September, 27, 1924, in support of the application for an order under S. 36, sets out a number of very serious charges against the petitioners. The substance of those charges is that they, by coercion, fraud, undue influence, and forgery obtained mortgages of the insolvent's property for which no adequate consideration was paid. The properties in dispute are valued at many lakhs of rupees. The petitioners in their affidavit of December 16, 1924, deny those charges. The insolvent in his counter-affidavit of January 19, 1925, re-affirms them. In paras 4 and 6 of that affidavit it is stated that the object of the proposed examination under S. 36 is to obtain an order under clause 5 of S. 36 for the delivery of the property to the Official Assignee thereby avoiding the expense and delay of a regular suit.

I am not concerned at this stage with the merits of this dispute. It may, however, be noted that the Official Assignee at one time expressed an intention to file a suit. In the circumstances is it proper to allow the proposed examination under S. 36? In my opinion the object in view is beyond the scope of that section. It would not be possible to obtain the relief desired without setting aside the mortgages on the ground suggested. As to the scope of S. 36, I agree with the remarks of Chitty, J. in a somewhat similar case: (*In re Lucas* (1)). If it is correct to say, as I think it is, that S. 36 (4) and (5) was intended to provide a summary procedure for ordering payments of debts due and delivery of property where there was no dispute, (see p. 114), it is obvious that the procedure under that section is inappropriate in the case of such disputes as we have here.

The rule must be made absolute. No order as to costs.

Rule made absolute.

★ 1925 BOMBAY 330

PRATT, J.

Ardeshar Cowasji Patel—Plaintiff.

v.

K. D. and Brothers—Defendants.

O. C. J. Suit No. 2211 of 1924, Decided on 23rd January, 1925.

(a) *T. P. Act, S. 103 (J)*—Assignment by lessee — Personal liability continues.A lessee does not by assignment escape personal liability on the covenant of the lease. 2 *Doug.* 455 and 4 *T. R.* 94 *Foll.* [P. 330, C. 2]★ (b) *T. P. Act, S. 76*—Mortgage of leasehold—Mortgagee is bound to pay ground rent.

A mortgage by the lessee creates privity of estate, and the mortgagee is liable to the lessor on all covenants that run with the land including the covenant to pay rent. [P. 330, C. 2]

(c) *T. P. Act, S. 40*—Covenant to pay ground rent runs with land.

Covenant to pay ground rent and taxes is a covenant which runs with the land as it affects the land, which is the subject of the demise.

[P. 331, C. 1]

J. H. Vakeel—for Plaintiff.*Kania*—for Defendant.**Judgment.**—Plaintiff is a lessee of a plot of land at Kirkee measuring 13,639 square yards, under a lease from the Secretary of State for the term of thirty-three years from April 1, 1918.

The plaintiff sub-leased to the first defendant a plot out of the said land measuring 8,704 square yards. The sub-lease was dated April 8, 1922, but the term began from September 1, 1921, and was for seven years. The rent reserved by the sub-lease is Rs. 600 per mensem, and the sub-lessee covenanted to pay a proportion of the ground-rent and taxes of the property so demised. The ground-rent was a proportionate part of the rent reserved by the head-lease to the Secretary of State.

On June 1, 1922, defendant No. 1 with the consent of the plaintiff assigned by way of mortgage his interest as sub-lessee to the third defendant.

Plaintiff has been paid rent up to January 31, 1923, but no ground-rent or taxes have been paid ever since the commencement of the term, *i.e.*, from September 1, 1921.

Plaintiff sues to recover these arrears up to February 29, 1924.

Defendant No. 1 was adjudicated insolvent on January 24, 1924, and defend-

ant No. 2 is the Official Assignee. No relief is claimed against the Official Assignee and he is not liable and he is not a necessary party for the term was assigned prior to the insolvency and did not vest in him; and the liability on which defendant No. 2 is sued is purely personal and contractual.

There is no question as to the liability of defendant No. 1 who has not appeared. He is the lessee of the plaintiff and is liable on his covenant for rent from February 1, 1923, and for a proportion of the ground-rent and taxes from September 1, 1921. S. 108 (j) of the Transfer of Property Act expressly enacts that a lessee does not by assignment escape personal liability on the covenant of the lease, and follows on this point the English law, for which see *Eaton v. Jaques* (1) and *Auriol v. Mills* (2).The arrears of rent are from February 1, 1923, to February 29, 1924, Rs. 7,800. The plaintiff drops his claim for a proportion of the taxes. The proportion of the ground-rent from September 1, 1921, till February 29, 1924, is the fraction of $8,704/13,639$ multiplied by 150 per month, *i.e.*, Rs. 95 per month for thirteen months. For defendant No. 3, the assignee of the lessee, it is contended that his liability is limited by S. 76 of the Transfer of Property Act as he is a mortgagee. That section defines his duty to his mortgagor but has no bearing on his liability to the lessor. The Transfer of Property Act defines the right and liabilities of the lessor's transferee in S. 109, but is curiously silent as to the assignee of the lessee. But under English law it is clear that an absolute assignment by the lessee creates privity of estate, and that the assignee is liable to the lessor on all covenants that run with the land including the covenant to pay rent: *Walker v. Reeves* (3) and *Williams v. Bosanquet* (4). And this law has been followed by the Madras High Court before and after the Transfer of Property Act in *Kamala Nayak v. Ranga Rau* (5) and *Kunhanujan v. Anjelu* (6) and has been applied by this High Court in *Timmappa v. Rama Venkanna* (7).(1) [1780] 2 *Doug.* 455.(2) [1790] 4 *T. R.* 94.(3) [1780] 2 *Doug.* 461.(4) [1819] 1 *Br. & B.* 238=3 *Moore* 500=21 *R.* 585.(5) [1862] 1 *M. H. C.* 24.(6) [1889] 17 *Mad.* 296.(7) [1897] 21 *Bom* 311.

The mortgage to defendant No. 3 is by way of absolute assignment and therefore creates privity of estate: see *Thethalan v. The Eralpad Rajah, Calicut* (8). Defendant No. 3 is therefore, liable to pay rent from the date of the assignment, i.e., from June 1, 1922. The covenant to pay ground rent and taxes is a covenant which runs with the land as it affects the land, which is the subject of the demise. See *Spencer's case*; (9) *Dyson v. Forster* (10) and *Mathewson v. Ram Kanai Singh Deb* (11). In *South of England Dairies, Limited v. Baker* (12) a similar covenant to pay rents and taxes was held to be a covenant, running with the land. Defendant No. 3 is, therefore, liable to pay a proportionate share of the ground-rent and taxes from June 1, 1922. The plaintiff drops his claim for the share of taxes, i.e., water rent and conservancy, and it is agreed that the proportion of the ground-rent is Rs. 2,644.

There will therefore, be a decree for the plaintiff against the first defendant for the sum of Rs. 95 per month for nine months from September 1, 1921, to May 31, 1922. There will also be a decree against defendants Nos. 1 and 3 for rent of Rs. 600 per mensem from February 1, 1923, till February 29, 1924, and for a proportion of the ground-rent at the agreed figure of Rs. 2,644 with costs and interest and interest on judgment at six per cent.

Suit decreed.

(8) [1917] 40 Mad. 1111=32 M.L.J. 442=40 I. C. 841=21 M.L.T. 401.

(9) 1 Sm. L. Cas. 55.

(10) [1909] A. C. 98=78 L.J., K.B. 246=99 L.T. 942=25 T.L.R. 166.

(11) [1909] 36 Cal. 675=1 I. C. 626=9 C. L. J. 523.

(12) [1906] 2 Ch. 631.

★ 1925 BOMBAY 331

TARAPOREWALA, J.

Gordhandas Kalyanji Bhat—Plaintiff—Decree-holder.

v.

Gautamchand Rupchand—Defendant—Judgment-debtor.

O. C. J. Suit No. 2407 of 1924, Decided on 13th October, 1924.

★ Civil P. C., O. 30, R. 3—Proviso—Partnership dissolved to plaintiff's knowledge—One partner not served—Decree passed—Firm is liable under the decree though the partner not served is not bound.

In the case of a firm which has been dissolved to the knowledge of the plaintiff before the institution of the suit, the plaintiff must serve

each and every person whom he wants, to hold liable personally in respect of the decree passed against the firm. If he does not so serve he cannot execute the decree against the partner whom he has not served personally. But the right to execute the decree against the firm is in no way affected by the proviso. [P 332, C 2]

Jinnah—for Decree-holder.

B. J. Desai—for Judgment-debtor.

Judgment.—This is a rule taken out by one Gautamchand Rupchand, a partner in the defendant firm, calling upon the plaintiff to show cause why the decree passed in this suit on August 19, 1924, should not be set aside. The rule is taken out on the basis that the said decree was obtained *ex parte*.

The defendant firm, according to the said Gautamchand Rupchand, consisted of two partners, Gautamchand Rupchand and Dwarkadas Premji. The plaintiff is the tenant of a shop in the Mulji Jetha Market. He sub-let a portion of the shop to the defendant firm and filed this suit to recover from the defendant firm the arrears of rent for the said portion of the shop. The summons was served upon the said Dwarkadas Premji. He appeared at the hearing and admitted the plaintiff's claim. A decree was thereupon passed in favour of the plaintiff.

In his affidavit in support of the rule the said Gautamchand Rupchand alleges that the partnership was dissolved in November 1923, and further that the plaintiff was aware of the said dissolution and with the knowledge of such dissolution he served the summons on the said Dwarkadas Premji, that the said Dwarkadas Premji in collusion with the plaintiff did not inform the said Gautamchand of the filing of the suit and allowed the decree to be passed *ex parte*; and that the said Gautamchand did not come to know of the decree till after the same was passed.

The question as to whether the said Gautamchand is entitled to have the decree set aside turns upon the fact whether there was proper service of the summons on the defendant firm. If there was, then the decree was not passed *ex parte* as Dwarkadas Premji, an admitted partner of the firm, appeared at the hearing and admitted the plaintiff's claim. If the service of the summons was not proper, then the said Gautamchand would be entitled to have the decree set aside.

Mr. Jinnah, who appeared for the said Gautamchand, argued that under Order 30, rule 3, in the case of a partnership, which has been dissolved to the knowledge of the plaintiff before the institution of the suit, the service of the summons must be effected upon all the partners in the firm who are resident within British India. Order 30, rule 3, provides for the service of the summons in cases where suit is filed against a partnership firm in the firm's name. The service may be effected upon any one or more of the partners, or at the principal place at which the partnership business is carried on within British India upon any person having, at the time of service, the control or management of the partnership business there; and it is provided that such service should be deemed good service upon the firm so sued, whether all or any of the partners are within or without British India. Then, there is a proviso that in the case of a partnership which has been dissolved to the knowledge of the plaintiff before the institution of the suit, the summons shall be served upon every person within British India whom it is sought to be made liable. The said rule, to my mind, is quite clear and capable of only one construction, namely, that where a suit is, under Order 30, rule 1, properly filed against a partnership firm in the firm's name, service on any one or more of the partners or on the manager shall be deemed good service upon the firm. There is no difference at all as to the mode of effecting service whether the firm is going on or has been dissolved at that date of the service of the summons. If the service is effected as provided by rule 3, the suit can be proceeded with against the firm and the plaintiff is entitled to obtain a decree against the firm. In the case of partnerships, which are going concerns at the date of the institution of the suit, the decree which is obtained against the firm is binding on all the partners in the firm, whether they have been served individually or not. In the case of a firm, which has been dissolved to the knowledge of the plaintiff before the institution of the suit, an exception is made as to the liability of the partners in the firm under the decree passed against a firm by the proviso to Order 30, rule 3, and it is this, that in case of such a firm the plaintiff must serve each and every person whom he wants to hold

liable personally in respect of the decree passed against the firm, and if he has not done so he cannot execute the decree against the partner whom he has not served personally. The right to execute the decree against the firm is in no way affected by the proviso.

Mr. Jinnah argued that it would mean great hardship where a partner in a dissolved firm colluded with the plaintiff and allowed the decree to be passed against the firm in case the firm had assets which would be liable under the decree, as the share of the partner, who has not been served, in such assets would be liable for the payment of the decree and would thus be lost to such partner.

In the present case Gautamchand had alleged that he was the financing partner, that Dwarkadas Premji was only a working partner, that all the assets of the partnership belonged to him, Gautamchand, and if the decree was executed against the partnership assets it meant that he, Gautamchand, would be the sufferer and not Dwarkadas Premji. No doubt in cases like the present one, assuming that the allegations of the said Gautamchand are correct, there would be hardship; but in such a case the partner in the position of Gautamchand has a remedy by filing a substantive suit for setting aside the decree on the ground of fraud and collusion between the plaintiff and the partner who accepted service and submitted to the decree. If there is no such collusion, no doubt the capitalist partner would have to bear the whole loss; but that is the necessary consequence of the provisions allowing suits to be filed against partners in firm's name even after the dissolution of partnership provided that the cause of action accrued when the partnership was carried on. The construction which Mr. Jinnah asks me to put upon Order 30, rule 3, would make the provisions of the whole Order nugatory, with regard to a firm which has been dissolved to the knowledge of the plaintiff. To my mind, if the object of the legislature was to omit dissolved firms from the operation of the Order, the rules under the Order would have been differently worded. If further the legislature intended that in the case of dissolved firms the service should be different from the service in the case of a firm which is being carried on at the date of the institution of the suit, the legislature could have

very well made a clear provision for such different service. The fact that there is only one provision for service in the case of a suit filed against a partnership firm shows that the intention of the legislature was that in the case of such suits the service should be in the same way whether the partnership was dissolved or not dissolved at the date of the institution of the suit.

Admittedly here the summons was served on Dwarkadas Premji. Therefore, in my opinion, there was good service against the defendant firm under Order 30, rule 3.

Then Dwarkadas Premji appeared at the hearing, as he was entitled to do, as a partner in the defendant firm. The decree, therefore, passed in the suit was not *ex parte*.

That being the case the said Gautamchand is not entitled to the relief prayed for by him under this rule. The rule must, therefore, be discharged with costs.

Rule discharged.

1925 BOMBAY 333

PRATT, J.

Pranlal Tribhuwandas—Plaintiff.

v.

Goculdas Damodar—Defendant.

O. C. J. Suit No. 2426 of 1924, Decided on 26th February 1925.

Letters Patent (Bombay) Cl. 12—Mortgage property outside jurisdiction—Suit to determine rights of competing mortgagees—Court has no jurisdiction.

High Court has no jurisdiction to grant a declaration, as to who out of two competing mortgagees is a prior one, when the property mortgaged is situated beyond the jurisdiction of the Court (in this case in Cutch), though the mortgage transactions were entered into in Bombay. 14 Bom. 353 Considered. 29 Bom. 249 Foll. 26 Bom. L.R. 535 Doubled. [P 334 C 1]

Kanga—for Plaintiff.

Munshi—for Defendant.

Judgment.—In this suit plaintiff sues as mortgagee of certain property in Cutch belonging to the first defendant. The mortgage was made in Bombay on November 20, 1923, by deposit of title deeds.

He has joined in that suit the second defendant on the ground that the second

defendant falsely alleges that he is now in possession as prior mortgagee of the properties and denies the plaintiff's right to a charge on the said properties. Plaintiff accordingly prays not only for a decree for the sale of the properties but also for a declaration of his charge as against the second defendant.

The suit as between the plaintiff and the first defendant was decided by a consent decree taken on August 19, 1924, whereby a decree for sale was made on behalf of the plaintiff, with however this reservation as regards the second defendant, that that decree was to be without prejudice to the rights of the plaintiff and the second defendant, and the suit was adjourned in order that the rights of the plaintiff and the second defendant should be determined.

The second defendant claims a prior charge on the properties by a mortgage of May 1923. By a prayer in the original written statement he prayed for a declaration of the enforcement of that charge, but that written statement was amended on November, 11, 1924, and by the amendment the second defendant pleaded that the Court had no jurisdiction to make a declaration of plaintiff's charge as against him and all the other pleas in his written statement were subject to that objection. The point which has now been argued before me is as to whether I have jurisdiction in this suit to make a declaration that the mortgage alleged to have been created by the first defendant in favour of the plaintiff was not subject to the prior charge by the first defendant in favour of the second defendant in May 1923.

Now in the suit against defendant No. 1 jurisdiction was assumed following the rule in *Yeshwantrao Holkar v. Dadabhai Cursetji Ashburner* (1) that the provision of clause 12 of the Letters Patent as to 'suits for land' does not override the equitable jurisdiction assumed by English Courts in such cases. My own view, however, is that *Holkar v. Dadabhai Cursetjee Ashburner* (1) is not good law and that *Holkar v. Dadabhai* (1) has been in fact overruled by the Privy Council in *Harendra Lal Roy Chowdhuri v. Hari Dasi*

(1) [1690] 14 Bom. 353.

Debi (2), but as the contrary has been held by two other Judges of this Court and as *Holkar v. Dadabhai* (1) has been upheld and followed in a decision of the Appeal Court in *Venkatrao Sethupathy v. Khimji Assur Virji* (3), subsequent to the Privy Council decision, I have to treat *Holkar v. Dadabhai* (1) as being still good law.

The question then remains whether it necessarily follows that I have jurisdiction to give plaintiff declaration that he seeks as against the second defendant, I think not. Such a declaration is not within the equitable jurisdiction that is assumed in English Courts in such cases, and which was the basis of the decision in *Holkar v. Dadabhai* (1). That equitable jurisdiction was explained in *Norris v. Chambres* (4) and its limits stated in *Deschamps v. Miller* (5). That equitable jurisdiction has also been very well summarised by Sir Lawrence Jenkins in *Vaghoji v. Camaji* (6). The learned Judge there says (p. 256) :—

"An examination of the authorities appears to me to establish the proposition that a Court of Equity in England only assumed jurisdiction in relation to land abroad, where as between the litigants or their predecessors some privity or relation was established on the ground of contract, trust or fraud, but in no case of which I am aware has the Court of Equity entertained a suit, even if the defendant was within the limits of its jurisdiction, where the purpose was to obtain a declaration of title to foreign land."

It seems to me clear that there is no such privity between the plaintiff and second defendant and that *Vaghoji v. Camaji* is an express decision of this Court that I have no jurisdiction to give a declaration that has been asked for. Also in *Norris v. Chambres* (4) the Court refused to declare a lien on foreign land.

Then the Advocate General contends that the charge which defendant No. 2 has, was created in Bombay. But that is a

consideration which seems to me irrelevant. It would only be material if the suit were between the first and second defendants.

A reference has also been made to Order 24, rule 1, and it is said that plaintiff could not have filed this suit without making—as required by that rule—every person interested in the mortgage, party to the suit. But that rule is a rule of procedure and not a rule that can be invoked in order to extend jurisdiction. The object of the rule is that the rights of all parties interested in the mortgage should be determined in one suit and a multiplicity of suits avoided. That cannot apply where the Court has no jurisdiction to adjudicate on the rights. It is true that in the case of *Sorabji v. Rattonji* (7), where a foreclosure suit was brought by the mortgagee in respect of land outside the original Civil jurisdiction of this Court, an order was made to join as a party the prior mortgagee Jivraj Ludha, but it does not appear from the judgment in that case that the point of jurisdiction was taken or that there was any conflict in that case between Jivraj Ludha the prior mortgagee and the puisne mortgagee who brought the foreclosure suit, or that a declaration against Jivraj Ludha was sought.

The Advocate General also refers to a dictum in *Venkatrao Sethupathy v. Khimji Assur Virji* (3) stated above by Scott, C. J. to the effect that a suit in which a mortgagee seeks to have land sold is not a suit for land. I find it difficult to understand this dictum. An interest in land is a land and a suit in which an interest in land is realised must be a suit for land.

Again it is contended that if there is jurisdiction as in *Holkar v. Dadabhai* (1) against the first defendant, it stands to reason that there must be jurisdiction against the second defendant who derives his interest from him. But a mortgage not in the English form does not even create privity of estate [see *Thethalan v. The Eralpad Rajah, Calicut* (8)] but it is not privity of estate that equity is concerned with but privity of contract or notice. There can be and is no such privity between the plaintiff and the second defendant.

(7) [1898] 22 Bom. 701.

(8) [1917] 40 Mad. 1111=32 M.L.J. 442=40 I.C. 841=21 M.L.T. 401.

(2) [1914] 41 Cal. 972=41 L.A. 910=1 L.W. 1050=27 M.L.J. 80=(1914) M.W.N. 462=16 M.L.T. 6=18 C.W.N. 817=19 C.L.J. 484=16 Bom. L.R. 400=23 I.C. 637 || 12 A.L.J. 774 (P. C.)

(3) [1916] 26 Bom. L.R. 535=80 I.C. 442.

(4) [1851] 29 Beav. 246=30 L.J. ; Ch. 285=7 Jur. (N. S.) 59.

(5) [1908] 1 Ch. 856=93 L.T. 564=77 L.J. ; Ch. 416.

(6) [1904] 29 Bom. 249=6 Bom. L.R. 938.

It is true that the effect of my decision will lead to an anomaly, for whereas according to *Holkar v. Dadabhai* (1) each of the mortgagees may file a suit against the mortgagor and have their rights as between each of them and the mortgagor determined in a suit in this Court, while the respective interests of the mortgagees *inter se* cannot be so determined. This, however, is the necessary effect of the judgment in *Holkar v. Dadabhai* (1) and until that judgment is reversed by the decision of a Full Bench, that anomaly must persist.

I, therefore, decide the issue No. 1 in the negative.

The suit is accordingly dismissed with costs as against the second defendant.

Suit dismissed.

★ ★ 1925 BOMBAY 335

TARAPOREWALA, J.

Bahadurmāl Gurmukhrai Nemani—
Plaintiff.

v.

*Mohanlal Surchand and others—*Defendants.

O. C. J. Suit No. 3061 of 1924, Decided on 19th December 1924.

★ ★ *Adverse Possession—Right to open shutters and maintain weather frames is acquirable by adverse possession.*

Where the plaintiff had opened his shutters and maintained his weather-frames projecting for more than twelve years on the defendant's soil. [P 335 C 1]

Held: that he acquired a right thereto by adverse possession, and was entitled to an injunction against the defendants restraining them from building, so as to interfere with the right of the plaintiff to open the shutters on the defendant's land or to interfere with the said weather-frames. 3 Bom. 174; 28 Bom. 428 Foll.

[P 336 C 1]

Kanga and Mulla—for Plaintiff.

Bahadurji—for Defendant.

Judgment.—In this case the plaintiff abandoned at the hearing his claim that certain windows in the west wall of his building were ancient windows and that he was entitled to an easement of light and air through the said windows. He has confined his claim to an alleged right to open the shutters of the said windows on the defendant's property, and, further, to maintain weather-frames on the windows

in the west wall on the second and third floors of the plaintiff's building as they exist at present. The said right to open the shutters at will and to maintain the said weather-frames on the windows is based on the ground that the said windows have been so opened and the said weather-frames have been in existence for more than twelve years and that the plaintiff is entitled to the said rights not by way of easement but by way of adverse possession of the column of air on the defendants' property, in which the said shutters open and on which the said weather-frames project.

The defendants have contended that the right to open the shutters of the windows as well as the right to maintain the weather-frames on the windows are in the nature of an easement and they can be acquired only, under the Indian Easements Act, by enjoyment for twenty years prior to the date of the suit. It is conceded by the plaintiff that if the said rights can only be acquired by way of easement, he has not done so, and must fail.

The question as to the nature of the right acquired by the owner of one tenement having a part of his tenement projecting over his neighbour's tenement was considered in *Mohanlal Jechand v. Amratlal Becharadas* (1). In that case the projecting part was the roof of the defendant's house. The said roof had projected for more than thirty years. Therefore, in either view of the case whether it was treated as an easement or as possession of the space occupied by the projecting roof, the defendant was entitled to succeed. Mr. Justice West, however, expressed his opinion, that the view that the enjoyment by the defendant of the right to project his roof was in the nature of possession by him of the space occupied by the projecting roof, commended itself to the Court.

The question again came before this Court in *Ranchod Shamji v. Abdulabhai Mithabhai* (2). There the question was whether the plaintiff's beams which were over-hanging the defendant's soil gave the plaintiff a right to the column of air above the said beams. Jenkins, C. J., who gave the judgment of the Court, held that the defendant being the owner of the soil was entitled *prima facie* to all above it, that the diminution in his rights by rea-

(1) [1878] 3 Bom. 174.

(2) [1904] 28 Bom. 428=3 Bom. L. R. 356.

son of the beams did not extend beyond the protrusion of the beams themselves, that is to say, so far as the beams protruded on the defendant's soil, the plaintiff was entitled by possession to the column of air on which the beams rested. He relied upon the judgments in *Corbett v. Hill* (3) and *Harris v. De Pinna* (4). Those cases clearly lay down that where any part of the house of one owner projects over the soil of the neighbouring owner the right acquired by the first owner is in the nature of possession of the column of air occupied by the said projection and that the said right is in the nature of the diminution of the freehold of the neighbouring owner and not merely in the nature of an easement.

It was contended before me by Mr. Bahadurji on behalf of the defendants that in view of the definition of "easement" in the Indian Easements Act those cases do not apply to India. The "easement" is defined by S. 4 as follows:—

"An easement is a right which the owner or occupier of certain land possesses as such for the beneficial enjoyment of that land, to do and continue to do something, or to prevent and continue to prevent something being done, in or upon, or in respect of certain other land not his own."

Mr. Bahadurji has argued that the opening of the windows and the maintenance of the weather-frames being for the benefit of the dominant tenant, the rights acquired in respect thereof come within the definition of "easement." In my opinion, the fallacy in the argument is this that whatever is for the benefit of the dominant tenant must be an easement and cannot be anything else. The enjoyment of the freehold is also for the benefit of the dominant owner. The right of easement is something less than the right of freehold and that something can be acquired for the benefit of the freehold under certain circumstances as laid down in the Indian Easements Act, but that does not mean that whatever is for the benefit of the dominant owner must necessarily be an easement and nothing else.

Mr. Bahadurji has relied upon two latter judgments of this Court in support of his contention, namely, *Chhotalal*

Hirachand v. Manilal Gagalbhai (5) and *Mulia Bhana v. Sundar Dana* (6). The question in those cases was a claim to maintain eaves projecting on the defendant's soil for the purpose of discharge of water on the defendant's land. Now the right to discharge water over the defendant's land clearly can never be in the nature of possession of freehold. It must necessarily be in the nature of an easement. The cases, therefore, are not directly in point so far as the claim to maintain a projection over the defendant's soil, which may be in the nature of possession, is concerned.

The learned Chief Justice has tried to distinguish the decisions in *Corbett v. Hill* (3) and *Ranchhod Shamji v. Abdullabhai Mithabhai* (2). He concedes that the projection in *Corbett v. Hill* was reserved from the freehold by the transferor, which means that a projection on the neighbour's soil might be in the nature of a freehold: if it could not be, then, it could not be reserved even by the transferor. If such a part of the freehold could be reserved by the transferor by allowing a projection on his own soil, there is no reason why the neighbouring owner should not be entitled to acquire a right to such projection by adverse possession by encroaching upon the freehold of his neighbour to the extent of the projection.

Mr. Bahadurji had to contend that possession could only be of the soil and everything above and everything below it, and that there could not be possession of a column of air over-hanging the soil, because once it is conceded that you can have freehold in a projection over-hanging on the defendant's soil, and occupying a certain column of air above that soil, a neighbouring owner would be entitled by adverse possession to claim such a right in freehold. What was considered in *Corbett v. Hill* (3) was whether the projection carried with it the right not only to the column of air occupied by the projection but the air above and the air below it to the soil, and the Court held that the possession was only of the column of air occupied by the projection and that the column of air above and below belonged to the neighbouring owner who was the owner of the soil.

(3) [1870] 9 Eq. 671=39 L. J.; Ch. 547=22 L. T. 263.

(4) [1886] 33 Ch. D. 238=56 L. J.; Ch. 344=54 L. T. 38=50 J. P. 308.

(5) [1913] 37 Bom. 491=20 I. C. 246=15 Bom. L. R. 551.

(6) [1913] 38 Bom. 1=21 I. C. 552=15 Bom. L. R. 876.

The same principle is laid down in *Harris v. De Pinna* (4). In that case also the projection was treated as part of the free-hold and the claim to the air above the projection which was in dispute was considered to be in the nature of an easement. There was no question in that case of the plaintiff being entitled to maintain his projection which had been there for twelve years.

The point was also considered in *Rathinavelu Mudaliar v. Kolandavelu Pillai* (7). The Madras High Court followed the decision in *Mohanlal Jechand v. Amratlal Becharadas* (1), and held that the cornice over-hanging a neighbour's land could not be removed, if it had been in existence for more than twelve years. There also it was held that such projection was in the nature of possession and not an easement.

A later English case, *Laybourn v. Gridley*, (8) was also cited to me where *Corbett v. Hill* was followed by the learned Judge.

The last case cited before me was a judgment of this High Court in *Kashibai Kaliddas Patel v. Vallabhaji Wagjibhai Patel* (9). There also the right in question was the right of the discharge of water from the eaves of the defendant on to the plaintiff's land. In that case, the real point considered was the right which was claimed, namely, to discharge rain water from the projecting eaves. There the learned appellate Judge, from whose judgment the appeal was preferred to this Court, held that the plaintiff had lost his title to the land up to the line of the defendant's projection. Macleod, C. J. rightly criticised that decision as very startling and obviously wrong. No doubt even where the projection exists over a neighbour's property for more than twelve years, the person owning the projection cannot claim anything more than the right to possession of the column of air which the projection occupies.

The point which is before me was not before this Court in any of these three subsequent cases, but in my opinion, it was directly in issue in the first two cases of *Mohanlal Jechand v. Amratlal Becharadas* (1) and *Ranchod Shamji v. Abdula-*

bhai Mithabhai (2). I entirely agree with the views in those judgments. I hold that the plaintiff having opened his shutters and maintained his weather-frames projecting for more than twelve years on the defendants' soil, he has acquired a right thereto by adverse possession, and he is entitled to an injunction against the defendants restraining them from building so as to interfere with the right of the plaintiff to open the shutters on the defendant's land or to interfere with the said weather-frames.

There will, therefore, be a decree in favour of the plaintiff for an injunction restraining the defendants from building so as to interfere with the weather-frames and the column of air on which the plaintiff's shutters open. Plaintiff to pay all the defendants' costs occasioned by the plaintiff's claim as regards easement of light and air, and the defendants to pay the plaintiff's costs of the issues raised in the suit.

Suit decreed.

★ 1925 BOMBAY 337

TARAPOREWALA, J.

John Robert Ball—Plaintiff.

v.

Charles William Ball—Defendant.

O. C. J. Suit No. 3988 of 1924, Decided on 3rd February, 1925.

★ *Will—Construction — Priority of legacies—Statement that a particular legacy should be given first and then another—Intention to give priority cannot necessarily be presumed.*

The intention of the testator to give priority to a particular general legatee cannot be gathered from a mere use of the words that a particular legacy is to be given immediately or that a particular legacy is to be given first and another legacy in the second place, and after the payment of these legacies a third legacy is to be given. (1912) 2 Ch. 241 followed. The notion that his assets would prove insufficient to pay off all legacies should not be attributed to the testator.

[P 338 C 1, 2]

Pandia—for Plaintiff.

Judgment.—In this case the estate of the deceased testator is not sufficient to pay all the legacies directed to be given by the will and the questions raised in this Originating Summons are as to whether the legacy of Rs. 15,000 under clause 2 (a) in favour of Mrs. Mary Josephine Ball should have priority over the lega-

(7) [1906] 29 Mad. 511=16 M. L. J. 281.

(8) [1892] 2 Ch. 53=61 L. J., Ch. 352=40 W. R. 474.

(9) 1922 Bom. 88=46 Bom. 827=24 B. N. L. R. 305.

cies in favour of the grand-children and great grand-children under clause 2 (b), and further whether the legacies under clause 2 (c) should rank *pari passu* with the legacies under clause 2 (a) or should also be paid after the legacy under cl. 2 (a) has been fully satisfied.

It has been argued on behalf of the plaintiff that because in clause 2 (b) the words used are "subject to the aforesaid," the legacy under clause 2 (b) can take effect only after the legacy under clause 2 (a) has been fully satisfied and that there being no such words in clause 2 (c), the legacy under clause 2 (c) should rank with the legacy under clause 2 (a) and that unless and until they are satisfied the legacy under clause 2 (b) cannot take effect.

The other view of the matter is that all the legacies under clauses 2 (a), (b) and (c) should proportionately abate in view of the insufficiency of the estate.

Mr. Pandia cited to me the observations of Williams on Executors at p. 1096 and the case of *Lewin v. Lewin*, (1) in support of the proposition that the words in this will clearly indicated an intention of the testator to give the legacies under clauses 2 (a) and (c) priority over the legacy under clause 2 (b). The observations at p. 1096 are elaborated at pp. 1097 and 1098, and there are subsequent cases on the point which show how the intention of the testator is to be gathered from the will. In *Lewin v. Lewin* (1) the priority was given to one general legatee on the ground that the legacy was in favour of the wife and children and on the words of the will the testator could not have intended that the legacy in favour of the wife and children should abate along with the legacies in favour of other legatees.

In my opinion, that case has no bearing on the construction of the will in this case. But the cases which have a bearing and which, to my mind, cover the point raised in this case, are *Blower v. Morret* (2); *In re Schweder's Estate: Oppenheim v. Schweder* (3) and *In re Harris: Harris v. Harris* (4). These cases clearly show that the intention of the testator to give priority to a particular general legatee cannot be gathered from a

mere use of the words that a 'particular legacy is to be given immediately or that a particular legacy is to be given first and another legacy in the second place, after the payment of these legacies a third legacy is to be given.

The question is elaborately discussed by Mr. Justice Warrington in *In re Harris* and there he cites with approval a passage in the judgment of Knight Bruce, V. C. in *Thwaites v. Foreman*, (5) which is as follows:—

"*Prima facie*, all bequests stand on an equal footing, and it lies upon those who assert the contrary, to prove it. It is not sufficient that the words of the will should leave the question in doubt. They must positively and clearly establish, that it was the intention of the testator that the bequests should not stand upon an equal footing. Now, in considering whether such was the intention of this testator, we must recollect that words that are merely introductory cannot, generally, by themselves be held to direct any order of payment; we should also bear in mind an opposite observation of Sir John Leach, [I think contained in *Beeston v. Booth* (6)], that, unless the testator tells you himself, that he believes his assets to be insufficient, you must attribute to him the notion that he has assets sufficient to satisfy all the bequests that he makes; and, if you attribute that notion to him, you cannot well infer that he intended to make provision for an order of payment applicable only to the case of the assets being insufficient."

Mr. Justice Warrington on these observations goes on to hold in *In re Harris* that although the testator in that case had used the words that certain legacy should be paid in the first place and another legacy in the next place, and that afterwards or after payment of the earlier legacies, certain further legacies should be paid, those words were not capable of the construction that the testator thought that his estate would be insufficient and in that case certain legacy, which was asked to be paid first, should have priority over subsequent legacies.

The words in this will, to my mind, are in no way stronger than the words in *In re Harris*. If anything, they are weaker. The words "subject to the aforesaid" do not indicate the intention of

(1) [1752] 2 Ves, Sen 415.

(2) [1752] 2 Ves, Sen. 420.

(3) [1891] 3 Ch. 44=60 L. J; Ch. 656=65 L. T. 64=39 W. R. 588.

(4) [1912] 2 Ch. 241=81 L. J; Ch. 512=106 L. T. 755.

(5) [1844] 1 Coll. C. C. 409=10 Jur. 483.

(6) [1819] 4 Madd. 161=20 R. R. 287.

the testator that the legacy in favour of Mrs. Mary Josephine Ball should be paid first. The legacy under clause 2 (b) is in favour of grand-children and great-grand-children. It is inconceivable that the testator should have intended that his companion and friend Mrs. Mary Josephine Ball and her sons should get the legacy in the first place and only after they had been paid, the legacies in favour of his own kith and kin—his own grand and great grand-children—should be paid. It is further clear from the will that there was no such intention on the part of the testator as shown by sub-clause (e) of clause 2, where the testator specifically mentions that after satisfaction of the above legacies if anything remains as residuary estate, the same should be divided equally among his grand-children and great-grand-children. It clearly indicates that the testator considered that the estate would be sufficient to pay the said legacies and that there might be a surplus and therefore he tried to provide for the disposition of such surplus.

The first question is not correctly put. The legacies other than the legacies in favour of Mrs. Mary Josephine Ball are legacies given by clause 2, sub-clause (b) and sub-clause (c).

I, therefore, answer the questions as follows:—

Q. 1. Whether the legacy of Rs. 15,000 in favour of Mrs. Mary Josephine Ball given by clause 2, Sub-clause (a), of the said will has priority over the other legacies given by clause 2, Sub-clause (a), clauses 1, 2, 3, and 4 of the said will?

A. In the negative.

Q. 2. Whether the said legacy of Rs. 15,000 in favour of Mrs. Mary Josephine Ball is liable to rank *pari passu* with the said abovementioned legacies and to abate proportionately with them having regard to the estate?

A. In the affirmative.

Q. 3. Whether the said legacy of Rs. 15,000 in favour of Mrs. Mary Josephine Ball has priority over the legacies given by clause 2, Sub-clause (c), of the said will?

A. In the negative.

Q. 4. Whether the said legacy of Rs. 15,000 in favour of Mrs. Mary Josephine Ball is liable to rank *pari passu* with the said abovementioned legacies and to abate proportionately with these having regard to the estate?

A. In the affirmative.

Costs to come out of the estate.

Order accordingly.

★ 1925 BOMBAY 339

MACLEOD, C. J. AND CRUMP, J.

Indurai Bhaurai Desai—Plaintiff—Appellant.

v.

Shivlal Nabhubhai—Defendant—Respondent.

Second Appeal No. 29 of 1923, Decided on 8th January, 1925, from the decision of the Asstt. J., Ahmedabad, in Appeal No. 217 of 1919.

★ Limitation Act, Art. 148—Mortgage executed in 1761—Acknowledgment alleged in 1858—Suit to redeem filed in 1916—Suit is barred.

In 1916 a suit was filed by plaintiff to redeem and recover possession of property said to have been mortgaged by a mortgage deed of June 8, 1761. The plaintiffs relied upon an acknowledgment said to have been made by the descendants of the mortgagee in 1858 in order to save his right from the bar of limitation.

Held; that the acknowledgment, assuming there was one in 1858, having been given more than sixty years after the date of the mortgage did not save limitation and the plaintiff's suit was barred under Limitation Act IX of 1871 which applied to the case. 27 Cal. 1004. Rel. On. [P. 340, C. 1]

G. N. Thakor, with M. H. Mehta—for Appellant.

H. C. Coyajee, with H. V. Divatia—for Respondent.

Macleod, C. J.—This action was instituted by the plaintiff to redeem and recover possession of property said to have been mortgaged by a mortgage deed of June 8, 1761. The lower Courts have held the mortgage proved, though there may be considerable doubts whether the original document, of which Exhibit 84 purported to be a copy, was really a mortgage within the terms of S. 58 of the Transfer of property Act. However, we may assume, for the purposes of this appeal, that the property was mortgaged in 1761.

The next question is whether the suit is within time. The plaintiff relied upon an acknowledgment said to have been made by the descendants of the mortgagee in 1858. Assuming again that there was such an acknowledgment, which I am not prepared to accept without doubts, would that be an acknowledgment sufficient to save the time bar? It is conceded that the Indian Limitation Act IX of 1871 applied to this mortgage, and

consequently a suit to redeem would have to be brought within two years of the Indian Limitation Act coming into force, as the mortgage had been executed more than sixty years before that date, and if a suit was brought thereafter the plaintiff would have to rely on an acknowledgment of his title to redeem, given in writing and signed by the mortgagee or some one claiming under him within sixty years of suit. But the acknowledgment, assuming there was one in 1858, having been given more than sixty years after the date of the mortgage, will not avail the plaintiff, as it seems, in spite of the ingenious argument of the appellant's counsel, that it comes within the decision of the Privy Council in *Fatimatul-nissa Begum v. Sundar Das*. (1). In that case the mortgage was dated October 17, 1788. The suit would have been barred in the absence of any acknowledgment made within sixty years from the date of the mortgage on October 17, 1848, by the effect of Act XIV of 1859, S. 1, clause 15, which barred the suit after January 1, 1862. Act IX of 1871, by S. 29, provided that at the expiration of the period granted to any person for instituting a suit for the possession of land his right to such land should be extinguished. Their lordships dealing with the contention that there had been a written acknowledgement prior to October 17, 1848, held that it had not been proved, with the result that as from October 17, 1848, the right of the mortgagors to sue was barred by force of the Act of 1859 and their right to the land was extinguished by force of the Act of 1871.

In this case, therefore, not only was the right to sue barred by the force of the Act of 1871, the first Act of limitation applicable to the case, but the mortgagor's right to the land was also extinguished, for it is impossible to distinguish the case I have cited on the question of principle from the case before us. There are many other grounds on which the plaintiff's suit could be dismissed, but it is sufficient for our purpose to hold that the suit for redemption is barred.

I should like before concluding this judgment to make special reference to the really admirable judgment of the Subordinate Judge in the trial Court. The appeal is dismissed with costs.

Crump, J.—I agree that this suit is barred by limitation. The land is situated in the Panch Mahals District, which up to 1851 was not part of British India. At the time of the cession of that District to the British Government, the Act governing limitation was Act XIV of 1859, but that Act had no application to non-regulation or scheduled districts unless specially extended, and it is not disputed that before the enactment of Act IX of 1871 there was no statute providing a period of limitations or suits in the Panch Mahals District. The position, therefore, was that prior to the enactment of 1871 there was no limitation to a suit of this nature. But assuming that before the Act of 1871 came into force any person was subject to the provisions of that Act, such a person had the option of filing the suit before April 1, 1873. But if he did not do so, then the period of limitation will be that provided in the Schedule to the Act of 1871.

The question which we have to determine is whether any such suit, as I have indicated, not having been filed, a suit of the nature now before us would be barred under the Act of 1871. For that purpose reference must be made to Art. 148 of the second schedule. The period allowed by Art. 148 is sixty years, and in the third column it is said that the time will be extended where an acknowledgment of the title of the mortgagor or of his right of redemption has been made within the prescribed period. Now assuming that we have here such an acknowledgment then the question is whether that acknowledgment is within the prescribed period. For the purpose of Art. 148, I take it that the Indian Limitation Act of 1871 should be construed as having a retrospective operation. "Prescribed period" really means a period of sixty years from the date of the mortgage, and it is conceded that if the document, on which reliance is placed, can be read as disclosing an acknowledgment, that acknowledgment was made more than sixty years from the date of the mortgage. It seems to me, therefore, clear that had the Act of 1871 been applicable to a suit filed for redemption that suit would have been barred, and it is also perfectly clear that the right to sue cannot have been revived by any subsequent enactment.

Appeal dismissed.

(1) [1900] 27 Cal. 1004=27 I. A. 103=4 C.W.N. 565=7 Est. 716 (P. C.)

★ 1925 BOMBAY 341

MACLEOD, C. J. AND CRUMP, J.

Bhikalal Girdharlal—Petitioner.

v.

Achratlal Lallubhai—Respondent.

Civil Extraordinary Application No. 51 of 1923, Decided on 10th December, 1924, against the order of the Sub. J. Nadiad in Suit No. 333 of 1920.

★ (a) Civil P. C., S. 115—Decree passed on an award—Revision is competent.

An application can be entertained under S. 115 against a decree passed in terms of an award. 29 Cal. 167 Expl. 36 Bom. 105 Foll. [P. 341, C. 1]

★ (b) Civil P. C., S. 115—Interference is discretionary and not obligatory.

There is no obligation on the High Court to interfere on an application made under S. 115, even if facts are proved which bring the application within the section. It is purely a matter of discretion, and no rules can be laid down how that discretion is to be exercised. Whether the court will interfere or not is entirely for the Court, which hears the application, to decide on the particular circumstances of the case before it. [P. 342, C. 1]

G. N. Thakor, and M. K. Thakor—for Petitioner.

H. C. Coyajee, and H. V. Divatia—for Respondent.

Macleod, C. J.—This is an application by the petitioner asking this Court to interfere under its powers given by S. 115 of the Civil Procedure Code with the order made by the First Class Subordinate Judge drawing up a decree in terms of the award, which was made in pursuance of an order of the Court, dated June 27, 1922, appointing the second opponent as arbitrator.

The first question is whether such an application is competent. We do not think that the authorities on the point go so far as to decide that no application can be entertained under S. 115 against a decree passed in terms of an award. It is true that the head-note in *Ghulam Jilani v. Muhammad Hussan* (1) is to this effect, but it is not warranted by the terms of their lordships' judgment, as we read it. At page 60 the judgment says:—

The award having been duly made and not having been corrected or modified, and the application to set it aside having been refused, the Subordinate Judge had no option but to pronounce a decree in

accordance with it. The Subordinate Judge does not appear to have exercised a jurisdiction not vested in him by law, or to have failed to exercise the jurisdiction so vested, or to have acted in the exercise of his jurisdiction illegally or with material irregularity. He appears to have followed strictly the course prescribed by the Code.

Inasmuch as their Lordships hold that the application in revision was incompetent, it would be a work of supererogation to discuss the various objections raised by the appellants in the High Court."

The inference is clear, that if it had appeared that the Subordinate Judge had brought himself within the provisions of S. 115 the application for revision would have been competent. But none of the objections in that particular case were directed to those provisions. We cannot agree, therefore, with the expression of opinion of Mr. Mulla in his notes to Paras 15 and 16 of the Second Schedule to the Code, that no application for revision should be admitted in the case of an award, and we agree with the decision of this Court in *Merali Visram v. Sheriff Dewji* (2). In this case the petitioner raised certain objections to the award of the arbitrator, making various allegations against the arbitrator, which, it was contended, if proved, amounted to misconduct. It is true that the Judge, on the application to set aside the award, did not deal *seriatim* with all the allegations made by the petitioner against the arbitrator. He dealt with some of the objections, notably with regard to an item of Rs. 13,430, which the arbitrator, who had been a party to the partnership suit, had allowed himself, and an item of Rs. 14,862 which the arbitrator had allowed to another partner Pranjivan, and concluded by saying: "There is thus no misconduct proved and I hold the award cannot be set aside and should be filed and a decree drawn up in terms of the award."

It would have been better if the Judge had referred to all the objections in the petition, stating whether they had been relied upon or not when the matter was argued before him.

But we think the proper inference for this Court in revision to make is that the Judge acted properly in dealing with the

(1) [1901] 29 Cal. 167=29 I. A. 51=4 Bom. L. R. 161=12 M. L. J. 77=6 O. W. N. 226=8 Sar. 154 (P. C.)

(2) [1911] 86 Bom. 105=12 I. O. 637=13 Bom. L. R. 1017.

objections, and that though he may not have made a reference to every one of them in his judgment, the omission points rather to the fact that those objections were not pressed before him. One of the allegations was that the arbitrator acted unfairly towards the petitioner in not hearing him or his evidence. Mr Coyajee has pointed out to us that although a summons was issued to the arbitrator to be examined as a witness, yet no attempt was made to examine him, but that was not the fault of the respondent.

We think, therefore, that it is more probable that the petitioner felt that these objections could not be pressed, so that there are no grounds on which we should exercise our discretion by interfering under S. 115. In fact there are some reasons for believing that this application was simply made for delay.

It seems necessary to point out again, as has been done in many other cases, that, there is no obligation on the High Court to interfere on an application made under S. 115, even if facts are proved which bring the application within the section. It is purely a matter of discretion, and we cannot lay down any rules how that discretion is to be exercised. Whether the Court will interfere or not is entirely for the Court which hears the application to decide on the particular circumstances of the case before it.

We would, therefore, discharge the rule with costs.

Rule discharged.

★ 1925 BOMBAY 342

MACLEOD, C. J. AND COYAJEE, J.

Chandulal Suklal Shet and others—Defendants—Appellants.

v.

Dagdu Mahadu Chaudhuri and others—Plaintiffs—Respondents.

First Appeal No. 104 of 1923, Decided 13th January, 1925, from the decision of the Sub J., Jalgaon, Suit No. 15 of 1921.

★ *Civil P. C., O. 2, R. 3—Five persons making five contracts with the same defendant—One suit by all five on the contract is not maintainable.*

Where a joint suit was brought against the same defendant by five different persons, each of whom had contracted to supply a certain number of maunds of cotton to the defendant, to recover from him the price thereof,

Held: the suit is not maintainable and must be wholly dismissed. [P 342 C 1]

D. C. Virkar—for Appellants.

V. B. Virkar—for Respondents.

Macleod, C. J.—The plaintiffs sued to recover Rs. 6,369-13-6 with interest and costs being the balance alleged to be due on account of 861 maunds and 29½ seers of cotton jointly sold by all the plaintiffs to defendant No. 1 on or about March 1, 1920, at Rs. 12 per maund. A decree was passed in favour of the plaintiffs for Rs. 1,609 with one third of their costs. It was proved in the trial Court that there was not one contract for the sale of 861 maunds of cotton by the plaintiffs to the defendant but that each plaintiff contracted to supply a certain number of maunds of cotton to the defendant, the total amount of the five contracts being 861 maunds. It was quite impossible, therefore, for the plaintiffs to join in one suit five different causes of action on five different contracts made by five different plaintiffs. But they do not seek to do that. They seek to base their claim against the defendants on a single contract, though it is perfectly clear on the evidence that there was not one single contract but five contracts. Consequently the suit must inevitably fail. The provisions of the Civil Procedure Code as regards the misjoinder of parties or the misjoinder of causes of action cannot possibly apply to this case. There is neither a misjoinder of parties nor a misjoinder of causes of action. But it is a case where a number of plaintiffs file a suit on a cause of action which does not exist. Consequently to allow any one of these plaintiffs to change the suit which was brought in the name of all into a suit brought by one of them would not come within the provisions of the Code which provide that no suit shall be defeated on a technical ground by reason of the misjoinder of parties or causes of action. Assuming that we were to accede to the respondents' suggestion that one of them should be allowed to continue the suit as based on his own contract, which of the plaintiffs is to be allowed to do this? There can be no answer to that question, and consequently the decision of the Court below was wrong, the appeal must be allowed and the suit dismissed with costs throughout.

Appeal allowed.

1925 BOMBAY 343

MACLEOD, C. J. AND CRUMP, J.
Kallappa Ramappa Deyannawar and others — Defendants — Appellants.

v.

Balwant Daso Bettigeri and others — Plaintiffs—Respondents.

Second Appeal No. 133 of 1923, Decided on 11th December, 1924 from the decision of the Asst. J., Belgaum, in Appeal No. 181 of 1921.

T.P. Act, (IV of 1882), S. 41—Charge created by decree on property—Owner of such property is not ostensible owner and cannot pass title to a transferee for value without notice.

A charge was created by a decree on the property in the possession of the judgment-debtor having the effect of reducing his full ownership to a limited ownership.

Held: he is not an ostensible owner of that property within S. 41 so as to give a title to a transferee for value without notice [P. 343, C. 2]

H. C. Koyajee and Nilakanth Atmaram —for Appellants.

Bahadurji, A. G. Desai and Y. N. Nadkarni for *K. H. Kelkar*—for Respondents.

Macleod, C. J.—This suit was originally dismissed on the ground that it was not competent according to the provisions of S. 47 of the Civil Procedure Code. In second appeal to this Court we held that that decision was wrong, and setting aside the proceedings of both the lower Courts remanded the case to the trial Court for decision on certain issues which this Court considered were the proper questions to be determined between the parties. It is now suggested that there was another issue which ought to have been sent down for trial, namely, whether the plaintiffs' objection to the sale advertised by the Mamlatdar should have been considered, and whether the fact that the objections were not considered was sufficient to invalidate the sale. More than four years ago this Court passed that order and now for the first time it has been suggested that that issue ought to have been remanded for trial. It is impossible now at this stage of the proceedings to consider that question. All the issues sent down by the High Court were found in favour of the plaintiffs, and consequently a decree was passed in their favour.

The important issue was the third issue: "whether the judgment-debtor was the ostensible owner of the suit lands with the consent, express or implied, of the decree-holder within the meaning of S. 41 of the Transfer of Property Act." That

would depend upon whether the charge created by the decree on the property in the possession of the judgment-debtor reduced his full ownership to a limited ownership. If his ownership was so reduced, then he could not be the ostensible owner so as to give a title to the transferee for value without notice. In *Maina v. Bachchi* (1) it was held, "that, it being clear upon the construction of the decree that it was the intention of the parties to create a charge on the property for the payment of maintenance within the meaning of S. 100 of the Transfer of Property Act, the charge could be enforced against the *bona fide* transferees for value without notice." The following passage appears in the judgment at p. 659:—

"The Transfer of Property Act recognises in the clearest manner that immovable property can be made security for the payment of money by way of charge, just as it recognises the various kinds of mortgages. It equally recognises the right to enforce the mortgage or charge. It would appear that the provisions as to registration contained in the Registration and Transfer of Property Acts apply to charges (when created by acts of parties) just as much as to mortgages, and if they do so apply I can see very little reason for drawing a distinction between mortgages on the one hand and charges (within the meaning of S. 100) on the other, and more particularly as registration amounts to notice."

It follows that there can be no difference between a decree directing that certain property should be a charge for the plaintiff's maintenance as decreed in the suit, and a decree directing, as in this case, that certain property should be a charge for payment of the decretal amount.

Consequently the judgment-debtor in this case was in no better position than a mortgagor who retains for himself the equity of redemption, so that it would only be the equity of redemption that he could dispose of. The result must be that the plaintiff only got at the sale what was left to the judgment-debtor, as he took the property subject to the charge created by the decree. The appeal must be allowed and the suit dismissed with costs throughout subject to any previous order thereon.

The plaintiff to pay costs of the present appellants throughout.

Appeal allowed.

(1) [1906] 28 All. 655=(1906) A. W. N. 165=
 8 A. L. J. 551.

★ 1925 BOMBAY 344

TARAPOREWALA, J.

Hardayal Shivalal—Plaintiff.

v.

Haji Adam Goolmahomed—Defendant.Application in O. S. No. 1162 of 1919,
Decided on 12th February 1925.★ (a) Civil P. C., O. 21, R. 52 — Moneys in
official Assignee's hands payable to judgment-debtor
are attachable.Moneys in the hands of the Official Assignee
which are payable to the judgment-debtors as
creditors of the insolvent by way of dividend de-
clared by the Official Assignee, are attachable
under O. 21, R. 52, of the Civil P. C. [P. 344, C. 2]

(b) Civil P. C., S. 2 (17)—Official Assignee.

The Official Assignee is a public officer within
S. 2 (17). [P. 344, C. 2]*The Official Assignee in person.**Mody*—for Applicant.**Judgment.**—The point for decision in
this matter is whether moneys in the
hands of the Official Assignee, which are
payable to the judgment-debtors as cre-
ditors of the insolvent by way of dividend
declared by the Official Assignee, are at-
tachable under O. 21, R. 52, of the Civil
Procedure Code.I have been told that there have been
judgments of single Judges of this Court
disallowing such attachment, following
the English cases on the point. There is
no judgment of a Judge of this Court with
reasons given for the decision on the
point which might be of some assistance to
me in deciding this question. The judg-
ments of single Judges, however, are not
binding on me.Now there is no doubt that in England
it has been held that the moneys in the
hands of the Official Receiver payable by
way of dividend to the judgment-debtor as
creditor of the insolvent are not a debt
liable to be attached within the meaning
of O. 45, R. 1, of the Supreme Court
Rules. The point was decided in *Prout v.*
Gregory, (1) on appeal from the Order of
a Master discharging a garnishee order
nisi, referred by a Judge at Chambers to
the Court. The judgment of Lord Cole-
ridge, C. J. is no doubt based on a broad
ground, namely, that to make a garnishee
order in such a case would be to interfere
with the administration of an estate
which has to be administered under theprovisions of a statute (Bankruptcy Act
1883, 46 & 47 Vic. c. 52) expressly dealing
with the subject-matter, and containing
express directions as to the manner in
which the subject-matter is to be dealt
with.The judgment of Mathew, J., however,
is put on the ground that the amount of
the dividend so payable to the creditor of
the insolvent cannot be treated as a debt
and that the Official Receiver is not a
debtor. In support of the opinion he cites
the judgment in *Dolphin v. Layton* (2),
where it was held that money in the
hands of the Registrar of a County Court
as an Officer of the Court was not subject
to the process of attachment on the ground
that the moneys were not a debt due by
the Registrar.Whether Lord Coleridge, C. J. was right
under the English law in laying down the
broad ground on which he disallowed the
attachment or not, in my opinion, the
matter is covered by O. 21, R. 52, of the
Civil Procedure Code. That rule provides
for attachment of property in the custody
of any Court or public officer. I find that
there is no similar provision in the Sup-
reme Court Rules, the only provision in
the Supreme Court Rules being the rules
under the heading. "Attachment of
debts" and, as put by Mr. Justice Mathew
in *Prout v. Gregory*, (1) unless the moneys
sought to be attached are a debt, they
cannot come under O. 45, R. 1, of the
Supreme Court Rules, so as to be liable
to be attached. The provision in the
Civil Procedure Code for attachment of
debts is made by O. 21, R. 46. Rule 52
deals with attachment of moneys in the
custody of any Court or public officer. A
public officer is defined by S. 2, clause 17,
sub-clause (h), of the Civil Procedure
Code, and the Official Assignee is a public
officer coming within that definition. It
was so held in *Joosub Haji Alli v. N. W.*
Kemp. (3)There is no doubt that the amount in
the hands of the Official Assignee which
is payable by way of dividend to the judg-
ment-debtors in this matter is the amount
in the hands of a public officer and is
payable by the public officer to the judg-
ment-debtors. I do not think that by
making an order on the Official Assignee
to pay the amount to the decree-holder,(1) [1889] 24 Q.B.D. 281=59 L.J. Q.B. 118=
61 L.T. 696=38 W.R. 204=7 Morrell 1.(2) [1879] 4 C.P.D. 130=48 L.J., C.P. 426=27
W.R. 786.

(3) [1902] 26 Bom. 809=4 Bom. L.R. 929.

who is the creditor of the person entitled to the dividend, I should be in any way interfering with the administration of the insolvent's estate. Immediately the creditor goes to the Official Assignee and asks for the moneys he is entitled to receive the same.

If the Official Assignee does not pay the dividend to the creditor, no suit can be filed against him, but the Court may, on the application of the creditor who is aggrieved by such refusal, order him to pay it, and also to pay out of his own money interest thereon at such rate as may be prescribed for the time that it is withheld, and the costs of the application as provided by S. 74 of the Presidency Towns Insolvency Act.

By this order I direct the public officer to pay the moneys to the decree-holder of the creditor instead of to the creditors.

Order accordingly.

1925 BOMBAY 345

MACLEOD, C. J. AND CRUMP, J.

Ahmed Suleman Jiva—Plaintiff—Appellant.

v.

Rander Town Municipality—Defendant—Respondent.

First Appeal No. 203 of 1922, Decided on 10th December 1924, from the decision of the Dt. J., Surat.

Bombay Dt. Municipal Act, (III of 1901) S. 96—Grant of permission amounting practically to refusal—Municipality cannot order.

The Municipality have no power on an application to build, to pass an order which practically amounts to a refusal. They would be entitled to direct that the proposed building should be set back to a certain distance from the street, but they would not be entitled to order that on each side of the building open spaces should be left with the object of preventing the applicant from building at all. [P 346 C 2]

The Municipality must acquire the land in the proper way if they wish to create open spaces. [P 346 C 2]

G. N. Thakor with M. B. Dave—for Appellant.

S. S. Patkar—for Respondent.

Judgment.—The plaintiffs are owners of a house site at Rander which is 13 feet by 120 feet. On December 11, 1918, they gave notice to the Municipality of their

intention to build a house on this site through their attorney Ismail Hussen Jiva. On December 23, at a meeting of the Managing Committee of the Municipality at which the application was considered it was resolved that the Committee were unable to interfere with the resolution previously passed by the General Board in the matter. On March 11, 1919, the matter came before a special general meeting of the Municipality, when it was decided (Exhibit 68) that the Board was of opinion that permission could be granted on the applicants undertaking to leave off building on both sides of the land namely the east and west, that is to say, on their leaving a set-back on the east and west to the streets on which the land abutted. Accordingly it was resolved that a letter should be written to the Collector and permission should be given on receiving a reply. The Collector replied on July 22, stating that he had seen the land and agreed with Mr. Anderson's order that the land should not be allowed to be built upon except on the conditions made by him. According to those conditions 5 feet from the northern side and 5 feet from the southern side had to be left vacant, so that the owner would only be able to build on a strip 3 feet wide. That was really a refusal to permit the owner to build on his land.

So the General Board resolved on July 24, 1919, that Ismail Hussen should be informed that they could not make any alteration in the permission note granted by the General Board on July 19, 1915. That order was communicated to the plaintiffs on August 8, 1919, and it is really that order against which the plaintiffs have applied to the Court for relief. The history of the previous application for building on this land is as follows: One Fatma had given notice to build on the land in 1913 and the Municipality gave her permission, but the order passed on that application by the Municipality was cancelled by the Collector acting under the powers given him under S. 174 of the Bombay District Municipalities Act (Exhibit 53). The Collector said "the Municipality should effect this (the prevention of excessive congestion) by requiring the landholder to leave a margin of five feet not built upon on each side of his proposed building (which is impossible). Since he cannot do that he cannot build at all." As a matter of fact

Fatma who made the application was not the owner of the land. Then in 1915, one Mahomed Suleman Jiva, purporting to be a co-sharer in the land, had given notice to the Municipality of his intention to build, and on July 19, 1915, a resolution was passed that permission could be given on the condition that the building should be within the alignment in front, and 5 feet of space should be left open on each side. Before that order was passed Suleman died, and it is to that order to which the Municipality referred in their letter of August 8, 1919, addressed to the plaintiffs' attorney. The learned Judge in the Court below held that the suit was barred by limitation because it was not brought within six months from the orders of the Municipality in 1913 and 1915 and the resolutions of the Managing Committee dated December 23, 1918, and of the General Board dated July 24, 1919. On the other issues it was held that the Collector had power under S. 174 of the Bombay District Municipal Act to suspend the permission granted by the Municipality, and that the resolution of the Municipality dated July 24, 1919, adhering to its order of 1915, was not illegal and *ultra vires*.

It seems to us that the real point which lies within a very small compass had not been perceived by the District Judge. The order on the resolution of July 24, 1919, was only communicated to the plaintiffs on August 8, 1919, and from that date the plaintiffs had six months' time within which to appeal to the Court for relief, and therefore the suit was within time. It is not a suit to set aside an order of the Collector. The only order of the Collector, which we have before us was made in September 1913 on the application of Fatma, who was not the owner, to build on the land. It is true that the Municipality in 1919 before passing their order referred the matter to the Collector for his advice. The Collector advised that the previous order passed by Mr. Anderson should be adhered to, and this was incorporated in the terms of the order made on the plaintiffs' application. This advice given by the Collector in 1918 could not be an order under S. 174 of the Act, which only gives the Collector power to suspend an order which a Municipality has actually made.

Therefore the only question is whether the order of the Municipality of August 8

was within their powers under S. 96 of the District Municipal Act.

We agree with the appellants' contention that the Municipality have no power on an application to build to pass an order which practically amounts to a refusal. They would be entitled to direct that the proposed building should be set back to a certain distance from the street, but they would not be entitled to order that on each side of the building open spaces should be left with the object of preventing the applicant from building at all.

On referring to the plaint we note that the land between the two streets on the east and west has been divided up into narrow strips, and it may be that the Collector thinks that in the interest of the inhabitants of the town an open space should be created in the block of buildings between the two streets. The question whether the Collector can, under the powers given to him by S. 174 of the Act, virtually deprive an owner of the use of his land without giving him compensation does not arise in this case. In any event such improvements cannot be brought about by orders passed by the Municipality under S. 96 of the Act. The Municipality must acquire the land in the proper way if they wish to create open spaces. We think, therefore, that the order of August 8 of the Municipality was *ultra vires* to this extent that they had no power to direct the plaintiff to set back his building on the north and south so as to prevent him building on his own land.

The appeal will be allowed to that extent with costs in both the Courts.

Appeal allowed.

1925 BOMBAY 346

MACLEOD, C. J. AND CRUMP, J.

Mohanlal Motilal Shah—Plaintiff—Appellant.

v.

Harilal Bhogilal Shah and another—Defendants—Respondents.

First Appeal No. 330 of 1922, Decided on 5th December 1924, from the decision of the Sub. J., Nadiad, in Suit No. 70 of 1922.

Presidency Towns Insolvency Act, (III of 1919)—Transaction between creditor and insolvent behind the back of the official assignee is void.

All transactions between the insolvent and the creditor conducted behind the back of the

Official Assignee and without informing the Court, must be considered as null and void.

[P 347 C 1]

G. N. Thakor and M. H. Mehta—for Appellant.

H. V. Divatia—for Respondents.

Judgment.—The plaintiff brought this suit to recover Rs. 8,100 on three promissory-notes of Rs. 2,700 each, signed by the first and the second defendants, with interest thereon. The promissory-notes were signed on October 12, 1921.

The plaintiff had got a decree for Rs. 14,517 in the High Court in Suit No. 2756 of 1919 against defendant No. 1, who was adjudged insolvent by an order of the High Court on October 4, 1921, under the Presidency Towns Insolvency Act, and consequently any dealings thereafter between the plaintiff and the insolvent with regard to his property, his assets or estate would be null and void as against the Official Assignee, and also as against the Court which had the conduct of the insolvency proceedings. According to the evidence it seems that the plaintiff had compromised his claim of Rs. 14,517 by accepting a present payment of Rs. 1,100, taking promissory-notes for Rs. 8,100 and relinquishing the rest of his claim.

The whole proceeding was tainted with fraud. The first defendant being insolvent could not make any payment to his creditors, and Rs. 1,100 paid by the insolvent to the plaintiff was money vested at that time in the Official Assignee. The second defendant was induced in some way to be a party to the fraud and signed the promissory-notes without receiving any consideration whatever. It has been contended that unless we find from one of the sections of the Presidency Towns Insolvency Act some authority for the proposition that any transaction between the insolvent and the creditor, conducted behind the back of the Official Assignee and without informing the Court, must be considered as null and void, we cannot set it aside. There is no necessity to refer to any particular section in the Act, because any such transaction would be wholly repugnant to the scheme of the Act, since the whole of the insolvent's estate is vested in the Official Assignee, his affairs have to be investigated by the Official Assignee and the Court which deals with his discharge, and consequently there is nothing left for the insolvent to

do except to perform his duties which are prescribed by the Act by giving information and assistance to the Official Assignee, and proceeding to take the steps necessary to obtain his discharge.

The suit was clearly bad against the first defendant because no leave of the Court was obtained, and there was very good reason for not asking the Court's leave, because if the Court had been aware of all the circumstances from which the claim arose in the plaintiff's suit, it would certainly have declined to give the leave asked for, and would probably have ordered the plaintiff to pay into Court Rs. 1,100 which he had received from the insolvent. The Judge was, therefore, clearly right in dismissing the suit against the first defendant.

With regard to the second defendant the plaintiff cannot separate the transaction and say that it was good as against the second defendant, although it was bad as against the first defendant, as the whole transaction was tainted with fraud. Therefore the decision of the Court below was right and the appeal must be dismissed with costs.

Appeal dismissed.

★ ★ 1925 BOMBAY 347

MACLEOD, C. J. AND CRUMP, J.

Dhanaji Jhelaji—Plaintiff—Appellant.

v.

Gulabchand Pana and others—Defendants—Respondents.

First Appeal No. 163 of 1922, Decided on 27th November, 1924, from the decision of the First Class Sub J., Thana, in Civil Suit No. 250 of 1919.

★★ *Contract Act, S. 253 (6)*—One partner assigning his interest to a third party—Assignee cannot claim accounts from other partners nor can he sue for dissolution.

If one partner assigns his share to an outsider without the consent of his partners during the existence of the partnership, no immediate rights accrue to the assignee as against the other partners, the assignee only having a right against his assignor. One partner cannot by his action introduce a third party without the consent of the other partners, so as to give the third party a right to interfere in the management of the business or to ask for an account. It is only when dissolution occurs that the right of the assignee arises to take action in the same way as his assignor could have done, to claim an account

as from the date of the dissolution. But it is the assignor and not the assignee who can sue for dissolution. 10 Cal. 669 Dissented from.

[P. 348, C. 2. P. 349, C. 1]

G. N. Thakor and P. B. Shingne—for Appellant.

H. C. Coyajee, W. B. Pradhan and V. B. Virkar—for Respondents.

Judgment.—The plaintiff filed this suit, alleging that defendant No. 1 and his sons defendants Nos. 2 to 5 together with defendant No. 6 were trading in partnership in the name and style of Pana Nathaji, that plaintiff purchased the right, title and interest of defendant No. 6 in the partnership on March 20, 1918, that notice to render accounts was given to defendant No. 1 on March 21, when defendant No. 1 replied that the defendant No. 6 had passed a release on settlement of his right on April 3, 1918. Accordingly he prayed for a declaration that he was the owner of the $2\frac{1}{4}$ anna share of defendant No. 6 in the shop and that the moveable and immovable property of the shop should be divided and account taken of the shop.

Defendants Nos. 1, 2 and 4 pleaded *inter alia* that defendant No. 6 had passed a release in their favour on February 17, 1918.

Defendant No. 6 alleged that the release was obtained by fraud and misrepresentation, but that plaintiff purchased his right, title and interest with knowledge of the real facts relating to the release, and that the assignment was passed on the express understanding that defendant No. 6 was not to be liable to the plaintiff.

The plaintiff had also sued in the alternative for the recovery of Rs. 5,999 and interest as the consideration paid to defendant No. 6 for the assignment in case it was held that defendant No. 6 had no right.

The trial Judge held *inter alia* (1) that the release was not obtained from defendant No. 6 by fraud by the other defendants.

(2) That the sale deed of the plaintiff was not fraudulent or without consideration.

(3) That the plaintiff had no right to claim the share of defendant No. 6 in the partnership.

(4) Nor could he claim the amount of the consideration from defendant No. 6.

Consequently the plaintiff's suit was dismissed. The plaintiff has appealed to this Court. The release having been exe-

cuted before the assignment, even assuming that the plaintiff was entitled to sue to set it aside on the ground of fraud, his suit was bound to be dismissed as there was nothing left in defendant No. 6 after the release which he could assign.

But assuming that the release could not be avoided an important question arises with regard to the right of an assignee in a share in a partnership.

If one partner assigns his share to an outsider without the consent of his partners during the existence of the partnership, no immediate rights accrue to the assignee as against the other partners, the assignee only having a right against his assignor. If, at the time of the assignment the partnership has already been dissolved, then the further question would arise whether the assignee would have any right at all against the other partners, and whether he would be entitled to file a suit for an account.

The sixth defendant might be entitled to file a suit against the other partners for a declaration that the farkhat was not binding on him on the ground that he had been induced to sign it by misrepresentation or by fraud or on any ground on which a party is entitled to ask the Court to set aside a document he has signed. But whatever rights the sixth defendant may have had to ask the Court to set aside the document, he could not assign such a right to a third party. That would be a transfer merely of a right to sue which cannot be allowed under the provisions of S. 6 of the Transfer of Property Act.

So it was suggested by the plaintiff that the assignment operated as a dissolution of the partnership and entitled the assignee to sue. There is authority for that proposition in *Juggut Chunder Dutt v. Rada Nath Dhur.* (1). The head-note runs:—

"The effect of clause (6) of S. 253 of the Contract Act is not to render an assignment of a share in a partnership concern illegal or void as between the parties to the assignment, but only so far void as between those parties and the other partners as to cause an immediate dissolution of the partnership."

With due respect it is difficult to see how that construction can be placed on S. 253, Sub-cl. (6) of the Indian Contract Act, which merely states that no person can

(1) (1889) 10 Cal. 669.

introduce a new partner into a firm without the consent of all the partners.

The common law with regard to the position of an assignee of a partner has now been codified by S. 31 of the English Partnership Act, 1890, as follows:—

"(1) An assignment by any partner of his share in the partnership, either absolute or by way of mortgage or redeemable charge, does not, as against the other partners, entitle the assignee during the continuance of the partnership, to interfere in the management or administration of the partnership business or affairs, or to require any accounts of the partnership transactions, or to inspect the partnership books, but entitles the assignee only to receive the share of profits to which the assigning partner would otherwise be entitled, and the assignee must accept the account of profits agreed to by the partners.

(2) In case of a dissolution of the partnership, whether as respects all the partners or as respects the assigning partner the assignee is entitled to receive the share of the partnership assets to which the assigning partner is entitled as between himself and the other partners, and, for the purpose of ascertaining that share, to an account as from the date of the dissolution."

Therefore at common law the assignment by one of the partners of his share in the partnership without the consent of the other partners did not cause an immediate dissolution of the partnership. It did not give the assignee a right to an account of the profits. He had to accept the account of the profits as agreed to by the partners. And that must obviously be according to the principles of common sense, because when there is a contract of partnership, one partner cannot by his action introduce a third party without the consent of the other partners, so as to give the third party a right to interfere in the management of the business or to ask for an account. It is only when dissolution occurs that the right of the assignee arises to take action in the same way as his assignor could have done to claim an account as from the date of the dissolution.

That this also is the law in India appears from the following provisions of S. 254 (3) which apparently was not noticed by the Court in the case of *Juggut Chunder Dutt v. Rada Nath*

Dhur (1). "At the suit of a partner the Court may dissolve the partnership in the following cases: (3) when a partner, other than the partner suing, has done any act by which the whole interest of such partner is legally transferred to a third person." Consequently the assignment by one partner merely gives a right of action to the other partners to ask the Court to dissolve the partnership. The plaintiff then in this case was placed in this dilemma. If the *farkhat* was a valid release by defendant No. 6 of his interest in the partnership, he ceased to have any right of action against his late partners, and there was nothing left in him to assign to a third party. Defendant No. 6 could have brought an action to set aside the *farkhat* on the ground that it was induced by misrepresentation or fraud. He could not assign his right to sue to a third party. Then supposing on either of those grounds defendant No. 6 succeeded, and the *farkhat* was set aside, the partnership would still be existing between the partners, and the assignee from one of them would have no right of action. It is only a partner who can file a suit against the other partners for dissolution. Even assuming, as we are asked to believe, that the sixth defendant was excluded from the partnership after he had signed the *farkhat*, that by itself would not effect a dissolution. It would only give a right of action to sue for a dissolution under S. 254 (5) of the Indian Contract Act "when a partner, other than the partner suing, is guilty of gross misconduct in the affairs of the partnership or towards his partners." Therefore, if the office doors are closed against a partner, so that he is excluded from taking part in the partnership business, he can either treat the partnership as still existing, or he can file a suit for a declaration that the partnership is to be taken as dissolved from the date on which he proves misconduct towards him on the part of his partners. So that whichever way you look at the case, it is obvious that the plaintiff has no cause of action against defendants Nos. 1-5. He has joined with the cause of action against defendants Nos. 1-5, a cause of action against defendant No. 6, for the recovery of the money he had paid as consideration for the assignment passed in his favour by defendant No. 6. That was disallowed by the trial Court in paragraph 29 of the judg-

ment. It is no doubt open to a plaintiff to make an alternative claim even on inconsistent pleadings. But the Judge says "in the present case, however, the plaintiff purchased an actionable claim with full knowledge of the risk involved, and I do not think that he is entitled to any refund as on a failure of existing consideration and I find, on issue No. 4 accordingly." We agree, and as against defendants Nos. 1 to 5, the plaintiff purchased nothing but a right to sue which is not transferable.

The appeal, therefore, must be dismissed with costs. Costs to be given to respondents Nos. 1-4.

Appeal dismissed.

★ 1925 BOMBAY 350

MACLEOD, C. J. AND CRUMP, J.

Jadavbai Lakhichand & others — Defendants—Appellants.

v.

Multanchand Harakhchand—Plaintiff—Respondent.

First Appeal No. 357 of 1922, Decided on 10th December, 1924, from the decision of the Sub. J., Jalgaon, in Suit No. 415 of 1920.

(a) *Hindu Law — Partition — Reunion is not proved by mere statement.*

Mere mention in a release deed by one co-parcener that a previously separated co-parcener has reunited, is not by itself sufficient to prove re-union. It might be strong corroboration of any direct evidence that may be adduced to show that the co-parceners have reunited.

[P 350 C 2]

(b) *Hindu Law—Partition between father and son—Grand-son is presumed to continue to be joint with his father.*

In ordinary cases of partition between a Hindu father and his sons, the grandsons, though they take an interest in the family property as from their birth, can only derive that interest through their fathers with whom, the presumption is, that they remain joint after partition, but there is no presumption that the grandson remains joint with his grandfather.

[P 350 C 2]

★ (c) *Hindu Law—Succession — Co-parceners.*

Two separated co-parceners succeeding to the estate of a third separated co-parcener inherit as tenants-in-common.

[P 351 C 1]

*K. H. Kelkar—*for Appellants.

*V. B. Shingne—*for Respondent.

Judgment.—One Hasraj had four sons, Fulchand, Lakhichand, Harakchand and Chunilal. Fulchand passed a *Farkhat* in 1904 to his father, which was in effect a partition deed. In 1907, the re-

maining three sons also passed *Farkhats* to their father, which were in effect documents of partition. Chunilal died about 1907 leaving no heirs and we are not concerned with his estate. Harakchand died in 1912 leaving his son, the plaintiff. Fulchand died in 1916 leaving a widow. Then Hasraj died in February 1918 and Lakhichand died on March 22, 1918, leaving a widow.

Plaintiff claimed that he was entitled to the suit property on the ground that he remained joint with his grand-father after his father Harakchand had separated. He made an alternative claim that if he did not remain joint with Harakchand, he was entitled to the property left by Hasraj because he inherited it with his uncle Lakhichand and he became entitled to the whole by survivorship on Lakhichand's death.

The plaintiff has succeeded in the lower Court. We do not think that on the facts the learned Judge realised the true legal position. Fulchand separated in 1904. The Judge held that he reunited with Hasraj sometime before 1907, because in the *Farkhat* passed by Harakchand to his father, Fulchand was a party and Harakchand said that Hasraj and Fulchand were joint. It is an undoubted fact that Fulchand became separated in 1904, and therefore in my opinion a mere statement by Harakchand that in 1907 Fulchand and Hasraj were joint was not by itself sufficient to prove re-union. It might be a strong corroboration of any direct evidence that Fulchand and Hasraj re-united. Therefore Fulchand's widow is entitled to the property, if any, which Fulchand received when he separated. If the widow demands it there must be an enquiry whether any of the suit property belonged to Fulchand.

With regard to the plaintiff we cannot say that there is any evidence that when his father separated in 1907, he remained joint with his grandfather. In ordinary case of partition between a Hindu father and his sons, the grandsons, though no doubt they take an interest in the family property as from their birth, can only derive that interest through their fathers, with whom the presumption is that they remain joint after partition.

There is a distinction between a release and a partition. It may well be said that a father has no right to release his

son's interest in the family property while the grandfather is alive. But it has happened in this case that Harakchand obtained his share in the joint family property and was released of his liability for certain debts. Therefore it is clear there was a partition and his son must abide by it unless it can be set aside on the ground of fraud or for other good cause. Therefore when Hasraj died his property went to his son Lakhichand and his grandson the plaintiff as his co-heirs. The plaintiff has next contended relying on para 31 of Mulla's Hindu Law that according to the Mitakshara such co-heirs will take as co-parceners, and therefore on the death of Lakhichand plaintiff would be entitled to the property as against his widow. But Mr. Mulla is referring to sons in a joint Hindu family who inherit the self acquired property of their father. In that case they take it as co-parceners and if they continue as a joint family such property would go by survivorship. It is different, however, when the family is already separated. Then the heirs take the property as tenants-in-common. Therefore we allow the appeal to this extent as far as the widow of Fulchand, defendant No. 1, is concerned. She will be entitled to such part of the suit property which she can prove was taken by Fulchand in 1904. The second defendant will be entitled to half the property left by Hasraj to which her husband Lakhichand became heir, and the plaintiff will be entitled to the other half.

We therefore, send back the case to the trial Court for proper enquiries to be conducted in accordance with our judgment.

All costs to come out of the estate in both the Courts.

Case remanded.

★ 1925 BOMBAY 351

TARAPOREWALA, J.

Ved and Sopher—Plaintiffs.

v.

R. P. Wagle & Co.—Defendants.

Application in O. G. J. Summary Suit No. 2355 of 1922, Decided on 19th January, 1925.

* *Legal Practitioner—Lien of Solicitor—Judgment creditor attaching asset of judgment-debtor—Lien can be enforced.*

The solicitor's lien independently of the charging order has priority over any attachment by a judgment-creditor so long as the moneys attached remain within the jurisdiction of the Court, that

is to say, they are not realised and paid off to the judgment-creditor. 40 L. J. C. P. 524 *Foll.*

[P 352 C 1]

Sethna—for Attaching Creditors.

B. K. Desai—for Charge-holders Attorneys

Judgment.—In this matter the plaintiffs, Messrs. Ved and Sopher, ask for payment to them of the amount of a decree obtained by the defendants R. P. Wagle & Co. against one Narotamdas Haridas attached in execution of the decree in favour of Ved and Sopher in the suit and realised by the Sheriff.

The application is opposed by Messrs. Hiralal & Co., who acted as solicitors for R. P. Wagle & Co., and who have got a charging order in their favour on the decrees in favour of R. P. Wagle & Co., one of which is the decree attached in the present execution proceedings. The said decree was passed on July 8, 1924, and was attached by Ved and Sopher on July 10, 1924. The solicitors, Messrs. Hiralal & Co., got the charging orders on July 15 and 16, 1924. Thereafter Narotamdas Haridas, the judgment-debtor in the said decree, paid the monies in the Sheriff's office on August 5, 1924. The Prothonotary has certified that the only claim in execution against the amount of the decree is that of the decree-holders, Messrs. Ved and Sopher. The amounts paid in execution are now two sums of Rs. 2,500 and Rs. 500 Messrs. Hiralal & Co. contend that they are entitled to receive the said amounts in priority to the attaching creditors.

I have taken time to consider this matter because I was told that there were orders of this Court wherein the right of the judgment-creditor was held to have priority over the lien of the solicitor where a charging order had not been obtained prior to the attachment by the judgment creditor. I am unable to find any judgment with grounds or reasons for the judgment, and as this is a matter of importance to solicitors, I have gone through all the authorities on the point and I have given very careful consideration to the matter.

Now, the whole argument of the judgment-creditor in claiming to exclude the solicitor's lien comes to this, that the solicitor's lien, as existed in common law, could only attach to the property remaining in the hands of the judgment-debtor and once that property was attached by a decree-holder the property went out of

the hands of the client and the solicitor therefore could not claim a lien on the money which so went out of his client's hands, that the decree-holder who by his diligence attached the property prior to the solicitor's asserting or realising his lien was entitled to exclude the solicitor even from participating in the distribution of the moneys. In England there has been statutory provision giving effect to the lien of the solicitor by 23 & 24 Vic. c. 127, S. 28. It has been contended before me that prior to the enactment of the statute, the solicitor's lien only attached in cases where the money remained in the hands of his client, and that immediately the moneys were attached, the solicitor's lien came to an end. Unfortunately the English cases dealing with the point are mostly after the enactment of the statute 23 & 24 Vic. c. 127, and, therefore, there is some difficulty in getting at the real principle laid down in those decisions. The matter is treated by Cordery in his Law relating to Solicitors, (3rd Edn., at p. 388, as follows:—

"Where the lien is on a judgment recovered for the client the question of priority has often arisen between the solicitor and a judgment creditor attaching the debt under Order XLV (attachment of debts).

"The result of the more recent cases seems to be, that so long as the money is within the jurisdiction of the Court a charging order will have priority over an attachment, unless there has been *mala fides*, or great neglect on the part of the solicitors, notwithstanding that execution has actually issued on behalf of the judgment-creditor at the time when the solicitor applies for the charging order."

These observations mix up, the charging order under the statute with the lien under common law. But looking into the cases, I find it is distinctly laid down in *Shippey v. Grey* (1) that the solicitor's lien under common law, independently of the charging order, has priority over any attachment by a judgment-creditor so long as the moneys attached remain within the jurisdiction of the Court, that is to say, they are not realised and paid off to the judgment-creditor. In this case, the learned Lord Justices of the Appeal Court have followed a previous decision of the Court in

Faithfull v. Ewen (2). The matter has been fully dealt with by Lord Justice Brett in his judgment, and he has, independently of the previous decision in *Faithfull v. Ewen*, come to the conclusion that a solicitor was entitled to his lien in priority to an attaching creditor, and the principle on which the learned Lord Justice comes to the conclusion is this, that the money was earned by the act of the solicitor and that unless something had occurred to take away his right, he had a right in law and in equity to an order in his favour so that the moneys so earned might not be paid away to any one without his costs being reserved. In that case the defendant obtained an *ex parte* garnishee order before the solicitors could tax their costs and before they could do anything or take any steps to preserve their right. The argument of the judgment-creditor, as put by Lord Justice Brett, came to this, that in that case the solicitor could in no event have got a priority over the judgment-creditor as his costs had not been taxed before the garnishee order was taken out. Lord Justice Brett characterises the proposition as extravagant and holds that the only principle on which the solicitor could be deprived of his lien would be that if before the solicitor took any steps, the money had been disposed of in some way beyond the power of the Court so that the Court had no longer any jurisdiction over it then in that case the right of the solicitor would be at an end and the Court would be powerless to interfere. He gives an instance.—An execution had issued and been carried out so that the execution creditor had received the money; in such a case an application by the solicitor would be too late. Or again, if the client had received the money and paid it over to some creditor of his, in such a case the right of the solicitor would be at an end. He held that the garnishee order was not effective without a subsequent order, for cause might be shown against it, that a Court of equity considered that that which the solicitor had a right to have done was done and that the garnishee order obtained by the defendant did not take priority over the solicitor's lien. This judgment is not based on the statutory lien in respect of which a charging order could be obtained by the solicitor under 23 & 24

(1) [1880] 49 L. J. C. P. 524=42 L. T. 673=28 W. R. 877.

(2) [1878] 7 Ch. D. 495=47 L. J., Ch., 457=37 L. T., 805=26 W. R. 270.

Vic. c. 127, but entirely on the solicitor's lien at common law. If one considers the object for which that statute was enacted, it is quite clear that the provision in the statute was made with a view to give a further right to the solicitors which they had not prior to the enactment of the statute. They had no lien over the real property of their client and that was sought to be remedied by the statute 23 & 24 Vic. c. 127. But in making the said provision by statute, the legislature made it as wide as possible and the solicitor was empowered under the statute to obtain a charging order in respect of all the property of his client recovered through his exertions whether it was real or personal property. It does not, therefore, follow that before the enactment of the statute the lien so far as personal property was concerned was anything different from the lien given by statute. To my mind the effect of making a charging order under the statute is nothing more than to provide for enforcing the solicitor's lien which existed in respect of personal property prior to the statute and which was for the first time given in respect of real property of the client by the statute. The solicitor's lien at common law has been the lien which has been given effect to and enforced by the High Courts of Bombay and Calcutta. There is no statutory provision in India as regards the solicitor's lien. The solicitor's lien as it prevailed in England before the statutory enactment is clearly defined by Lord Justice Brett in *Shippey v. Grey*. If effect was given to the solicitor's lien at common law in the sense in which the judgment-creditor asks the Court to give it, it would be frustrating the whole object of the protection which the Court seeks to give to the solicitor by enforcing the lien, because as happened in this case the decree having been passed on July 8, and the attachment having been levied on July 10, there was no time for the solicitor to have his costs taxed so as to assert his lien in respect of these costs. And simply because the judgment-creditor obtains an order for attachment within two days of the passing of the decree he cannot be heard to say that the moneys, by reason of such attachment, go out of the jurisdiction of the Court so as to prevent the Court from interfering on behalf of the solicitor.

protection of the solicitor who is an officer of the Court by the Court interfering so long as the moneys are within the jurisdiction of the Court. By a mere attachment the moneys do not go out of the jurisdiction. I can well understand that if moneys had been realised in the course of the attachment and distributed and paid to the creditor and the solicitor had not obtained his charging order or had not come forward to claim his lien until that was done, he could not have claimed it as against the judgment-creditor who had got those moneys. Until the moneys are paid to the judgment-creditor they are still in the hands of the Court and within its jurisdiction and I do not see how a solicitor, who is entitled to his lien on the moneys obtained by his exertions which are in the hands of the Court, could be deprived of the fruits of his exertion by the mere fact of an attachment being levied on the moneys. Until the moneys are disposed of they remain within the jurisdiction of the Court and the solicitor is entitled to come to the Court and ask for its interference so as to protect his rights as regards his costs.

It has been pointed out to me that in Calcutta the solicitor's lien has been given effect to in a very wide manner. The question before the Calcutta High Court in *Harnandroy Foolchand v. Gootiram Bhuttar* (3) is not the question before me to-day but the judgment supports my view that the solicitor is entitled to the protection of the Court as far as possible, and that the solicitor's lien should be enforced and given effect to by the Court in all possible cases where the Court can effectively do so.

My attention was drawn to *North v. Stewart*, (4) in support of the proposition that the statutory enactment made a difference in the rights enjoyed by the solicitors prior to the enactment and thereafter in respect of lien for their costs on the moneys of their clients. Now that case decides entirely a different point and question of the effect of the statute 23 & 24 Vic. C. 127 is merely incidentally brought in. There is no doubt that there are some words in the judgment of Lord Watson at p. 463 which lend colour to the argument of the judgment-creditor here. But considering the facts of the case on

(3) [1919] 46 Cal. 1070=54 I. C. 691.

(4) [1890] 15 App. Cas. 452=63 L. T. 718

After all the lien is enforced for the

which the decision was given, I do not see that they are capable of the wide construction which the judgment-creditor wants to put upon them. The question in that case was of jurisdiction and it was contended that jurisdiction was ousted by reason of the attachment being invalid as the moneys attached did not belong to the judgment-debtor but to the solicitor who had a lien on the moneys, and their lordships merely considered this point, whether prior to the obtaining of the charging order it could be said that the moneys belonged to the solicitor and were not capable of being attached by the creditor of the client. Lord Watson observes at p. 463 as follows:—

“Assuming that their lien, when charged by the order of June 13 might operate in the same way as an intimated assignation by the original judgment-creditor, and terminate his interest in the debt; so long as the debt remains his property, the mere existence of a lien does not exclude the diligence of others having claims against him. The opinions expressed by the English Bench in *Hough v. Edwards* (5) and *Mercer v. Graves* (6) appear to me clearly to show that, in the Court of Common Law a solicitor's lien upon costs decreed does not, until it is converted into a charge by virtue of the statute, prevent their attachment by other persons having claim against the judgment-creditor.”

The question there was whether the debt could be attached and what Lord Watson holds is that the debt could be attached so long as there was no charging order but if there was a charging order to the fullest extent of the debt then no doubt, no interest of the judgment-creditor would remain and therefore there would be nothing which others could attach. But it does not follow from these observations that once the property is attached by others, the lien of the solicitor comes to an end. The judgments of the other Lords clearly show that their whole attention was given to the point whether the attachment in the first instance could be levied or not and not as to the effect of the attachment if the solicitor claimed to exercise his lien as against the moneys so attached. For that the decision in *Ship-*

pey v. Grey (1) is quite clear. This decision is later in date than the decisions in *Hough v. Edwards* (5) and *Mercer v. Graves* (6) referred to by Lord Watson in *North v. Stewart* (4), and in my opinion *Shippey v. Grey* (1) lays down the correct principle and is in no way in conflict with the decision of the House of Lords in *North v. Stewart* (4).

The decision of this High Court in *Devkabai v. Jefferson, Bhaishankar and Dinsha* (7) was cited to me, but it does not touch the point raised in this case. It merely says that the solicitor's lien in the High Courts of India is governed exclusively by the law as it existed in English Courts before the passing of 23 & 24 Vic. c. 127 by which that lien was very much extended. “Very much extended” means the extension to the real property which did not exist before the statutory enactment. The lien was confined to personal property before the statute. These passing remarks in the judgment in no way affect the question which is before me for decision. There is no judgment of this Court which is binding on me with which my present decision is in conflict. In my opinion the solicitor in the matter before me is entitled to the interference of the Court on his behalf, and he is entitled to enforce his lien as against the moneys in dispute in priority to the attaching creditor.

I may mention a further point and that was a point taken by the attorneys for Ved and Sopher that the charging order was in respect of costs incurred by R. P. Wagle & Co in other matters, *i. e.*, partnership suits, which have been fought out by Hiralal & Co. and that therefore they could not claim a lien on the judgment debt in this particular case excepting for costs of that case and not for their costs in general in respect of which they have obtained the charging order. In my opinion the question is not open to me as Mr. Justice Mulla, after consideration of the point, has made the charging order in respect of the solicitor's costs in general on the ground that the property was recovered by the exertions of the solicitor including the judgment debt in this matter and that they were entitled to a lien for all their costs on all property recovered by their exertions for the partnership. I do not express any opinion on the point as I hold that the learned

(5) [1856] 1 H & N 171=26 L. J; Ex 54=2 Jur (N. S.) 814

(6) [1872] 78 Q. B. 499=41 L. J; Q. B. 212=26 L. T. 551=20 W. R. 605,

(7) [1886] 10 Bom, 248.

Chamber Judge's order is clear on the point and he has given effect to the lien as claimed by the solicitors by giving the charging order. I, therefore, hold that Messrs. Hiralal & Co. are entitled to recover their costs under the charging order obtained by them in priority to the attaching creditor.

I am told that another sum of Rs. 500 has been paid into the Sheriff's office after this notice was taken out and as the solicitors' costs amount to a sum larger than Rs. 3,500, I direct that the solicitors are entitled to receive the said sum of Rs. 500 also.

All costs should come out of the moneys first. Counsel certified.

Application dismissed.

1925 BOMBAY 355

KEMP, J.

Jivanlal Panalal and others—Plaintiffs.

v.

Bai Manchha—Defendant.

O. C. J. Suit No. 1741 of 1921, Decided on 27th November 1924.

(a) *Bombay High Court Original Side—Taxation—Party taking, must pay costs—Taxing Master can make the party taking review pay costs of the other party.*

On the warrant to tax, the party taking the taxation must pay the costs of the proceedings on that warrant. But if the Taxing Master is of opinion that the party bringing in the bill has unnecessarily or vexatiously increased the costs he may report accordingly and the Chamber Judge, will make such order as to those costs as he thinks fit. The proper procedure in such a case is by summons. The costs of warrant to review should follow the event of such review. The Taxing Master not only has the power to award costs against the party taking out such a review but he has also the power to make him, in a proper case, pay the other party's costs.

(b) *Bombay High Court—Original Side—Plea—cost of Costs before Taxing Master are not allowed.*

It is not the usual practice to allow costs of counsel attending before the Taxing Master.

B. J. Desai and Coltman—for Plaintiffs.

Mulla—for Defendant.

Judgment.—This is an application to review the Taxing Master's taxation of the defendant's bill of costs.

The suit was for possession of certain immovable property, and on February 6, 1923, a consent decree was passed directing the costs of both sides to be taxed between party and party. There was no order as to which side should pay the other party's costs, but it is admitted that there was an agreement by which the plaintiffs agreed to pay the defendant's costs of the suit. An order had been made prior to the decree directing the plaintiffs to pay the costs of a particular day including the fees for the attendance of witnesses on that day. The taxation before the Taxing Master lasted from October 4, 1922, to November 15, 1922. After the latter date there was a further taxation with regard to payments alleged to have been made to the witnesses amounting to Rs. 924 odd. The plaintiffs contended that the moneys had never been paid to the witnesses, and, if any such payment had been made, that it had found its way back to the defendant's pocket. After no less than eleven meetings on this point before the Assistant Taxing Master and a large number of exhibits and books of account had been put in, he held on April 9, 1923, that the payments had not been made, or if they had, they were colourable payments and had come back to the hands of the defendant. The Assistant Taxing Master thereupon disallowed all the payments to the witnesses and ordered the defendant to pay the plaintiffs' costs after November 15, 1922. On April 16, 1923, the defendant applied for a review of the taxation. In that application she took no objection to the order against her for payment of costs. On April 27, 1923, the warrant to review the taxation was heard and adjourned to June 23, 1923. Prior to that date, however, on June 22, 1923, the defendant's attorneys wrote to the Taxing Master and the plaintiffs saying that they withdrew the application for review. On June 23, 1923, the Assistant Taxing Master noted the withdrawal of the review and adjourned the warrant to review only on the question of costs. On September 13, 1923, the defendant took out a fresh warrant to review the original taxation and objected to the order for payment of costs made by the Taxing Master on April 9, 1923. On September 29, 1923, the Taxing Master heard the second review and considered that the defendant was not

entitled to file a second review but nevertheless he held that he had no power to order the defendant to pay costs on April 9, 1923, and he directed the plaintiffs to pay the costs of the second warrant to review. The plaintiffs have come here on the Taxing Master's certificate of October 15, 1923, against that decision. They have also taken out a chamber summons in respect of the costs disallowed to them on the original taxation of the bill.

Now the procedure on the taxation of a bill in the taxing office is very simple. The bill is first taxed roughly by the clerks in the office and then more carefully by the Taxing Master. Thereupon a warrant to tax issues. On that the parties are heard and any party dissatisfied with the Taxing Master's decision takes out a warrant to review under rule 529. The parties are again heard by the Taxing Master and any party dissatisfied with his decision on the review applies for a certificate. With this certificate the Taxing Master states the grounds for his decision on the points on which a certificate is asked for. The matter then comes before a Chamber Judge for a review of the taxation.

Generally, it may be laid down that on the warrant to tax the party taking the taxation must pay the costs of the proceedings on that warrant. But if the Taxing Master is of opinion that the party bringing in the bill has unnecessarily or vexatiously increased the costs he may report accordingly and the Court, *i. e.*, the Chamber Judge, will make such order as to those costs as he thinks fit. The proper procedure in such a case is by summons.

The costs of the warrant to review should follow the event on such review. I really see no reason why the Taxing Master should not have power, in a proper case, to award costs against the party taking out such a review. It is conceded that he has power to make such a party, if he be the party bringing in the bill, pay his own costs of the review. I see no reason why he should not have power to make him, in addition, in a proper case, pay the other party's costs.

In both cases it is equally an exercise of his discretion. If the party bringing in a bill is entitled to take out a warrant to review as part of the procedure necessary to the final taxation of the bill,

then the Taxing Master has no more power to make him pay his own costs than he has on the warrant to tax. Nevertheless, as I have said, it is conceded the practice of the taxing office has been that the Taxing Master may make such party pay his own costs.

Applying these principles it is clear that in effect the Assistant Taxing Master has found on the warrant to tax that these alleged payments to witnesses were false. On that finding I see no reason why the defendant, whose bill it was, should not pay the plaintiffs' costs of the investigation on this point. It is only right and proper she should, and I accordingly make the summons absolute with costs except so far as the costs of bringing counsel on the taxation are concerned. Counsel certified.

With reference to the second warrant to review I am of opinion it was not competent, not only because no second warrant to review is contemplated by Rules 529 and 530 but also by the application to these proceedings of the principles of *res judicata*. It was open to the defendant to have applied to the Assistant Taxing Master to have the first warrant to review amended by inserting an objection to the order for costs passed regarding the proceedings on the warrant to tax. She did not do so but withdrew the first warrant to review. She cannot be allowed to harass the plaintiffs by taking out a second review. The Assistant Taxing Master, it appears from his reasons, was also of opinion that the second review was not competent. The order made on that second review including the order as to costs of it will, therefore, be set aside.

The costs of the first warrant to review have not been dealt with. There is no doubt that the defendant having taken out that warrant and abandoned it must pay the costs of it. I make an order accordingly. Costs of this review to be borne by defendant. Counsel not certified.

It is not the usual practice to allow costs of counsel attending before the Taxing Master, and a careful check should be kept on the further accumulation of costs in taxation. I see no reason here to depart from the usual practice and the costs of counsel will, therefore, be disallowed on all appearances in this matter before the Taxing Master.

This litigation has resulted in a species of vendetta between the parties which accounts for the bitterness with which they have contested every step in the taxation proceedings and before me.

Summons made absolute.

★ ★ 1925 BOMBAY 357

TARAPOREWALA, J.

Kedarnath Tulsidas—Plaintiffs.

v.

Beharilal Jagamal—Defendants.

O. C. J. Suit No. 3641 of 1921, Decided on 28th July, 1924.

★ ★ Civil P. C., S. 95—*Suit for damages for attachment before judgment on insufficient grounds—Attachment not effected—No cause of action exists.*

Mere procuring of an attachment before judgment does not of itself afford a cause of action for damages. It is an essential part of the cause of action in a suit for damages for the abuse of civil proceedings that the proceeding in which the process complained of is taken out, should have terminated in favour of the plaintiff or that the particular process complained of has been superceded or discharged. S. 95 is applicable only where the attachment is in fact effected and does not apply to a case where the attachment is applied for and has not in fact been levied. The remedy by way of a suit is allowed where the aggrieved party claims a larger compensation than Rs. 1,000. But that does not make the basis of the suit any way different from the basis on which compensation is allowed in the suit itself where the process has been wrongly put into effect, excepting that in a suit something more is required than under S. 95 and not that something less is required, namely, that under S. 95 it is sufficient to prove that attachment was applied for on insufficient grounds, while in a suit the plaintiff has to show not merely that it was applied for on insufficient grounds but that it was so done maliciously and without reasonable and probable cause. 39 *Mad.* 952 *Rel on.*

[P. 357, C. 2 ; P. 359, C. 1]

M. J. Mehta, with Vasvada—for Appellant.

Munshi, with Jinna and Kania—for Respondent.

Judgment.—This suit has been filed by the plaintiffs to recover a sum of Rs. 1,05,000 by way of damages on the ground that an attachment before judgment and injunction were applied for by the defendants in this suit in suit No. 2145 of 1921 filed by the defendants against the plaintiffs on insufficient ground, that such application was made by the

defendants wrongfully and maliciously and without reasonable and probable cause, and that by reason of such wrongful application the plaintiffs suffered damage in their credit and reputation and have been put to trouble and inconvenience and expenses.

Various issues were raised by Mr. Munshi for the defendants. The first issue is whether the plaint discloses any cause of action. Mr. Munshi has asked the Court to try this issue as a preliminary issue in order to save the costs and expenses of inquiring into the merits if the first issue is decided in the defendants' favour. Mr. Munshi has contended that the plaint does not disclose any cause of action on two grounds: first, that no attachment was in fact levied and that mere procuring of an order for attachment before judgment does not of itself afford cause of action for damages, and, secondly, that the order of attachment in the original suit was confirmed and a summons to vacate the said order was discharged by the learned Chamber Judge who heard it; that it is an essential part of the cause of action in a suit for damages for the abuse of civil proceedings that the proceeding in which the process complained of is taken out should have terminated in favour of the plaintiff or that the particular process complained of has been superceded or discharged.

In my opinion the defendants are right in both of their contentions on this point. As to the first point, it is admitted by the plaintiffs that no attachment was in fact levied, but the plaintiff's counsel contends, —although the cause of action is not so stated in the plaint,—that the very fact of the Court's bailiff going to the shop of the plaintiffs with a view to enforce the warrant of attachment was sufficient to cause damage to the credit of the plaintiffs, and that the fact of the bailiff's going in execution of the order, which, the plaintiffs say, was obtained maliciously and without probable and sufficient cause, was an abuse of the process of the Court, and that the plaintiffs need not allege anything further to entitle them to damages for the said act. In paragraphs 12, 13 and 14 of the plaint, the plaintiffs contend that they had suffered damage by reason of the wrongful application made by the defendants for attachment before judgment. Even assuming that the plaintiffs are not entitled to prove that the

bailiff went to the shop to enforce the warrant of attachment and that to prevent such attachment moneys were paid by a relative of the plaintiffs, as stated in the plaint, the said act of the bailiff does not give any cause of action to the plaintiffs. In *Rama Ayyar v. Govinda Pillai*, (1) attachment was not in fact levied on the plaintiff's moveables, but the reason why it was not levied is not stated in the facts of the case. Probably, there also the plaintiff paid the security, which is always mentioned in every warrant of attachment of goods, and for that reason the attachment was not levied. From the judgment of Mr. Justice Napier it appears that the bailiff did go to attach the moveables in pursuance of the warrant of attachment in that case. The only reason, therefore, to my mind, why the goods were not attached must have been that the plaintiff there gave security. But even if that was not the case the plaintiff in that suit did put his cause of action on the ground of the defendant's action in applying for attachment before judgment and "coming to attach his moveables," and the Court there held that procuring an order for attachment before judgment however maliciously did not of itself afford a cause of action for damages. In the present case also what happened, according to the plaintiff, was that the bailiff went to the shop of the plaintiffs to attach and that in fact no attachment was levied as a relative of the plaintiffs paid the amount mentioned in the warrant as being payable by the plaintiffs as security on his failing to show cause to the contrary. The warrant of attachment here does not order the plaintiffs to pay security and in default of such payment order attachment of the goods of the plaintiffs. As pointed out in *Lotlikar v. Lotlikar* (2) where a similar provision in the old Civil Procedure Code was considered by the Appeal Court, the construction of the usual order of attachment before judgment is this. The defendants are called upon to furnish security for the fulfilment of any decree that the plaintiffs might obtain against them or to show cause on any day fixed in the order why security should not be furnished and to this direction is appended an order for provisional attachment as provided in the form at the end of the

Civil Procedure Code. Mr. Justice West, in his judgment at p. 644, says that an order made under S. 484, which is similar to the provision for attachment before judgment in the Code of Civil Procedure, 1908, might mean "an attachment to be made conditionally on the security not being furnished or cause shown by the prescribed day, or it might mean an immediate attachment of a provisional kind conditioned to become plenary if security should not be furnished, or cause shown according to the terms of the order." Mr. Justice West held that the form showed that the latter was the intention of the legislature, and he goes on further to hold that if the attachment had been actually made it would in the first instance have been only a temporary one and the defendants showing cause on the day fixed in the order would have had it set aside and that to prevent the discredit and inconvenience that would arise from the attachment they took the only step open to them, namely, to pay the amount of security mentioned in the order. As Mr. Justice West observes (p. 644): "The order for attachment was supplementary to that for furnishing security, and the order for furnishing security was itself, if the defendants chose, dependent on their failing to show cause on the day fixed. Primarily, therefore, they had till that date to prepare their reasons, and the additional order for intermediate attachment could not deprive them of that right. Neither, therefore, should the giving of security to avoid the pressure of that order." These observations of Mr. Justice West clearly show that the giving of the security before showing cause as to whether security should be given or not is entirely optional with the plaintiff and that if he does give it, it is merely to avoid the discredit and inconvenience that might arise from the attachment.

The plaintiffs here have based their cause of action on the ground that there was discredit and inconvenience by the mere fact of the bailiff going to their shop not by reason of the giving of the security. The giving of the security in fact saved the discredit and the inconvenience. The plaintiffs, therefore, cannot contend that the very act which was done to save discredit and inconvenience resulted, notwithstanding its object, in discredit and inconvenience. To my mind this is a

(1) [1915] 39 Mad. 952=30 M.L.J. 180=(1916) 1 M.W.N. 156=32 I.C. 448=3 L.W. 82.

(2) [1881] 5 Bom. 343.

contradiction in terms, and, as observed in *Rama Aiyar v. Govinda Pillai* (1), there cannot be alleged any possible inconvenience or discredit by reason of the giving of the security, which would form the basis for a claim for damages for abuse of the process of the Court. Mr. Mehta contended that procuring an order for attachment with the object of getting speedy payment of the amount claimed in a suit was an abuse of the process of the Court sufficient to give the plaintiffs a cause for action for damages. In *Grainger v. Hill* (3), it was held that where the process of the law had been abused to effect an object not within the scope of the process, it was immaterial whether the suit which that process commenced had been determined or not or whether or not it was founded on reasonable and probable cause. Even in *Grainger v. Hill* (3), the process was enforced and the plaintiff was arrested. The principles of that case are applicable only where the process is employed to compel the aggrieved party to do something which he is not legally bound to do under the process, and not in a case like this which is analogous to an action for a malicious arrest or malicious prosecution. I need not refer to the various cases cited and discussed in *Rama Aiyar v. Govinda Pillai*. I express my entire agreement with the reasoning in the judgment of Mr. Justice Napier in that case.

Section 95 of the Civil Procedure Code, which provides for compensation in the case of wrongful attachment of the goods of a party, clearly shows that it is applicable only where the attachment is in fact effected and does not apply to a case where the attachment is applied for and has not in fact been levied. The remedy by way of a suit is allowed where the aggrieved party claims a larger compensation than Rs. 1,000. But that does not make the basis of the suit any way different from the basis on which compensation is allowed in the suit itself where the process has been wrongly put into effect, excepting that in a suit something more is required than under S. 95 and not that something less is required, namely, that under S. 95 it is sufficient to prove that the attachment was applied for on insufficient grounds, while in a suit the

plaintiff has to show not merely that it was applied for on insufficient grounds but that it was so done maliciously and without reasonable and probable cause.

On these grounds, therefore, I hold that the fact that attachment was not levied is quite sufficient to put the plaintiffs out of Court and that the plaint does not disclose any cause of action for damages.

Coming to the second ground, in my opinion, it is an essential part of the cause of action in a suit like this that the plaintiff must show that the order under which, he says, the process was enforced to his detriment whether by way of attachment or by way of arrest was set aside in the original suit. Halsbury's Laws of England, Vol. XIX, at p. 692, gives the exceptions to the rule that the termination of the proceedings in favour of the plaintiff or discharge of the process complained of must be proved to give a cause of action to the plaintiff; but the exceptions, to my mind, refer to cases of quite a different nature than a case under an order for attachment or arrest under the Civil Procedure Code. Under the Civil Procedure Code an order for attachment is not confirmed until the party against whom it is made fails to show cause against the order on the day fixed for the purpose. If by reason of the party's absence on the day so fixed the order is confirmed *ex parte* the party may take out a summons for having the order vacated, and if he succeeds in satisfying the Court that he was unable to appear for a sufficient cause and that the order was not justified on the facts the order would be vacated by the Court. The order for attachment complained of in this suit was confirmed *ex parte* and the plaintiffs took out a summons for vacating the same, but unfortunately for them, although the learned Chamber Judge was of opinion that there was sufficient cause for the plaintiff's absence and that the order was not justified on the facts, he dismissed the summons and did not vacate the order on the ground that the point was academic, as a decree had been passed against the plaintiffs for the amount which they had deposited for security and the plaintiffs had agreed that the amount so deposited by the plaintiffs should be withdrawn by the other party in satisfaction of the decree. The question, however, could not be treated as academic if the plaintiffs were going to claim heavy damages as

(3) [1888] 4 Blag. N. O. 212=5 Scott. 531=7 L. J. O. P. 85.

they have done in this suit. The question was very important from that point of view. The plaintiffs' counsel ought to have brought that aspect of the order to the notice of the Chamber Judge. It does not appear from the notes of the Judge's clerk that this point was put before the Chamber Judge. It may be that the point was not then present to the mind of the plaintiffs, or that counsel may have thought that even if the order was set aside, as no attachment had been levied, the result would be merely academic. If it had been present to the mind of counsel that a big claim for damages was going to be made because of the wrongful attachment, he would have asked the Court to vacate the order on that ground. Whatever may be the reason, I must say that I cannot go by the opinion given by the learned Chamber Judge. I am bound by the fact that the original order for attachment was confirmed and still subsists. I cannot in this suit go into the merits of that order and hold that the order was wrongly made and treat the order as discharged or vacated. On the second ground also, therefore, I hold that the plaint discloses no cause of action inasmuch as it does not show that the original order of attachment was vacated.

On this finding I do not think that the time of the Court or moneys of the parties should be further wasted in going into the merits of the case. I must say here that there is not a word in the plaint as to there being any damage by reason of the payment of the moneys by way of security. As to the damage by reason of the bailiff going in the shop, as held in *Rama Ayyar v. Govinda Pillai* (1), no such damage can be possibly proved, and to my mind, therefore, even on the merits it would be futile to allow the plaintiffs to adduce evidence to show that in fact there was damage. There could not possibly have been any damage.

I hold that it is not necessary to go into the other issues in the case, and that the suit must, therefore, be dismissed with costs.

Suit dismissed.

★ ★ 1925 BOMBAY 360

PRATT, J.

A. M. Roberts—Plaintiff.

v.

A. D. Shanks — Defendant.

O. C. J. Suit No. 3308 of 1922, Decided on 29th September, 1924.

★ ★ *Tort — Master and servant — Servant slightly deviating from master's instructions is not acting beyond the scope of his employment.*

Where defendant instructed his motor driver to take the car to the garage direct but the driver instead of taking it direct went home for meals and then took it to the garage by a circuitous way and on the way brought it in collision with plaintiff's car which suffered damage thereby.

Held: that the servant was acting within the scope of his employment and the master was liable. 4 Q. B. 476 Dist. [P. 361 C. 2]

M. V. Desai—for Plaintiff.

F. S. Taleyarkhan—for Defendant.

Judgment.—This is a suit by the plaintiff for damages for injury done to her car in a collision due to the negligence of the driver of the defendant's car.

The defendant pleads contributory negligence and also that the collision was due to the negligence of the plaintiff's driver, and accordingly supplements his written statement by a counter-claim for damages.

The accident occurred on January 13, 1922, at 9—30 P. M. The plaintiff's car is an Overland car and her husband was being driven in it to Mahim. Mr. Roberts was seated on the rear of the car and the driver was in the front seat driving. The accident occurred opposite the Church-Gate Street Station. Mr. Roberts did not actually see how the accident occurred but he saw the defendant's car sixty or seventy yards ahead driven at great speed. He looked down to arrange some parcels of provisions, which were rolling about at the bottom of the car, and the next thing that he knew was that the defendant's car had crashed into his. The driver, however, did see how the accident occurred and he says that he was driving at a moderate pace of twelve to fifteen miles per hour along the right side of the road, i. e., along the west side of the Queen's Road when the defendant's car approached him in the opposite direction. He says the defendant's car was driven very fast at a speed of twenty-five to thirty miles,

per hour and that it was driven in a very irregular manner zigzagging across the road. When the defendant's car came nearer, he says it swerved to the west on to him, and then he did the only thing possible, by swerving his own car to the east, but not in time to avoid the collision. The defendant's driver on the other hand admits that he was driving at fifteen to twenty miles per hour, but he says that he was driving on his proper side of the road, i. e., the east side of the Queen's Road. He says the plaintiff's car approached him from the south at a rate of twenty to twenty-five miles an hour, and that the plaintiff's car swerved suddenly to east. He stopped his car, but it was not in time to avoid the collision and that the plaintiff's car hit his.

[After discussing the evidence on the question whether the accident was due to the negligence of the driver of the plaintiff or of the defendant his Lordship came to the conclusion that there was no evidence to support the plea of contributory negligence. The Judgment then proceeded].

It is suggested that the plaintiff's driver swerving to the right contributed to the accident, but I do not think it did. The plaintiff's driver could do nothing else when the defendant's car swerved on to his right but to turn. He could not turn to the left, because, if he had, the cars would certainly have met, and therefore the only chance of escape was turning to the right and he therefore took the only course possible. I think that the accident was solely due to the negligence of the defendant's driver.

It is suggested that the defendant is not responsible for the negligence of the driver on the ground that the driver was not then acting in the course of his employment. Now the facts are that the defendant had employed his driver to drive him to Bori Bunder Station. The defendant left his driver there at 8-30 P. M. with instructions to take the car back to the Wellington Mews. The driver instead of taking the car to the Wellington Mews went to his own house somewhere in Princess Street, had his evening meal there, and at the time of the accident was driving from his home in Princess Street to the Wellington Mews. It is suggested that because the driver had disobeyed his master's instructions to go straight from Bori Bunder to the Wellington Mews, the defendant is not liable. The

following two cases were cited in support: *Sanderson v. Collins* (1) and *Storey v. Ashton* (2)

The facts in this case are distinguishable from *Sanderson v. Collins* (1) in that there the coachman had taken the carriage out for his own purpose, whereas here the driver had taken the car out on defendant's instructions and had been left in charge of the car by the defendant. In *Storey v. Ashton* (2) the accident occurred after the driver's employment in his master's business had terminated for although he had nearly returned home he drove off after business hours on an errand of a third person. Here the defendant's servant no doubt, deviated from the instructions of the defendant in going home for his meals, but at the time of the accident he was carrying out the defendant's instructions and was driving to the Wellington Mews in order to garage his car. It is quite clear, therefore, that at the time of the accident the defendant's servant was acting in the course of his employment, and was not on a frolic of his own.

The only other point remaining is the question of damages claimed for the injury to the car. This is proved by Hyland's bill which amounts to Rs. 2,050-2-3 and for loss of use of the car during the two months it was under repairs. The damages for loss of use the plaintiff estimates on the footing of what might have been the earnings of a taxi-cab, which she used as a private car, during that period. She estimates this amount at Rs. 25 per day, but there are no regular accounts to corroborate this figure. She also says that she could have hired a car at the time as a substitute for Rs. 20 a day including chauffeur's wages and petrol. Chauffeur's wages and petrol would not enter into the account because these were expenses which would be incurred in any case. I think the fair amount to allow for the loss of the use of the car is a sum of Rs. 10 a day for the sixty-one days.

There will be a decree for the plaintiffs for the sum of Rs. 2,660-2-3 with costs and interest on judgment at six per cent.

Counter-claim dismissed with costs.

Suit decreed.

(1) [1904] L. K. B. 628=73 L. J.; K. B. 358=90 L. T. 243=52 W. R. 354=20 T. L. R. 249.

(2) [1869] 4 Q. B. 476=38 L. J.; Q. B. 223=10 B. & S. 397=17 W. R. 727.

1925 BOMBAY 362

MACLEOD, C. J. AND COYAJEE, J.

Achyut Narayan Khare — Plaintiff—Appellant.

v.

Ramachandra Keshav Ukidve— Defendant—Respondent.

First Appeal No. 172 of 1923, Decided on 22nd January 1925, from the decision of the Sub. J., Thana, in Suit No. 135 of 1922.

Civil P. C., S. 34—Mortgage suit — Interest allowed from date of suit only so as to make interest equal to capital — Interest also allowed in case of default in payment from date fixed of payment—Award of interest was held proper.

There is a discretion vested in the Court to decide whether interest should be allowed on the redemption money from the date of the suit.

[P. 362, C. 2]

Where the lower Court allowed interest after the date of the suit so as to make the total sum decreed for interest equal to the amount of the principal and then allowed further interest in case of default, on the total sum from the date fixed for payment under the decree upto actual realisation at 6 p. c.

Held: that plaintiff had no particular claim on the Court to award him any further amount and that the award of interest was proper. [P. 362, C. 2]

A. G. Sathaye—for Appellant.*M. V. Bhat*—for Respondent.

Judgment.—The plaintiff sued to recover Rs. 9,782-8-0 as the balance still due on a mortgage bond, dated June 17, 1914, with costs and future interest. The lower Court found that the principal was Rs. 4,999, that the amount of interest due up to the date of suit was Rs. 4,783-8-0 but only allowed further interest after the date of suit so as to make the total of interest awarded equal to the amount of the principal. A preliminary decree was passed directing that the defendants should pay Rs. 9,998 with costs on or before July 15, 1923. Interest after July 15, 1923, was to run on the whole of the above amount at six per cent. until realisation.

The plaintiff has appealed on the following grounds:—(1) The lower Court was wrong in holding that the rule of *damdupat* applied in calculating interest in a mortgage suit from the date of the suit to the date fixed for redemption. (2) The lower Court should have at least allowed interest on Rs. 9,782-8-0 at the agreed rate from March 26, 1922, till which date interest was calculated as

stated in the plaint, up to July 15, 1923, the date fixed by the decree for redemption, after taking into consideration the payment of Rs. 8,100 made on or about April 30, 1923.

In *Hiralal Ichhalal v. Narsilal Chaturbhujdas*, (1) the suit was brought for redemption of a mortgage. The plaintiff claimed to be allowed interest on the redemption money for the period between the date of the suit and the actual date of redemption. It was held by the District Judge that the rule of *damdupat* applied, and therefore the amount of arrears of interest to be allowed was limited to an amount equal to the capital sum, but awarded no interest from the date of suit. It was contended that the omission to give interest was due to an oversight as no reference was made in the judgment to the question whether such interest could be allowed. The High Court treated the matter as if the District Judge had in the exercise of his discretion declined to allow interest, and it thought that there had not been an unreasonable exercise of his discretion. Their lordships of the Privy Council agreed with this decision and the grounds on which it rested. There is therefore a discretion vested in the Court to decide whether interest should be allowed on the redemption money from the date of the suit. There is nothing in the judgment of the lower Court in this case from which we can deduce that the Judge dealt with this particular question. He has allowed interest after the date of the suit so as to make the total sum decreed for interest equal to the amount of the principal. We are entitled, therefore, to consider whether in appeal we should allow any further interest from the date of the suit. The plaintiff has succeeded in getting a decree for double the amount of his capital which was invested on June 17, 1914. It cannot be said that a person, who has invested his money in a mortgage and has succeeded in doubling his capital in less than ten years, has any particular claim on the Court to award him any further amount. The Court has awarded interest from July 15, 1923, on the total redemption money, and consequently if the defendants failed to

(1) [1913] 37 Bom. 326=40 I.A. 68=17 C.W. N. 573=13 M.L.T. 415=(1913) M.W.N. 428=11 A.L.J. 432=17 C.L.J. 474=15 Bom. L.R. 483=18 I.C. 909=25 M.L.J. 101 (P.C.)

redeem, the plaintiff would recover interest not only on the capital but also on a similar amount of interest. We think, therefore, that the appeal should be dismissed with costs.

Appeal dismissed.

★ ★ 1925 BOMBAY 363

MACLEOD, C. J. AND CRUMP, J.

Manikbai Vishnudas Gujjar and others
—Plaintiffs—Appellants.

v.

Gokuldas Ramdas Karadgi and others—
Defendants—Respondents.

First Appeal No. 114 of 1923, Decided on 5th December, 1924, from the decision of the First Class Sub. J., Bijapur, in Suit No. 327 of 1920,

★ ★ *Hindu Law—Adoption—Adoptee married and having children—Estate in natural family vests in adoptee's daughter.*

Where a sole surviving co-parcener of a Hindu family is adopted into another family and has a daughter then living, his estate in his natural family vests in his daughter, on his adoption.

[P. 365, C. 1]

H. C. Coyajee and A. G. Desai — for Appellants.

Nilkanth Atmaram—for Respondent.

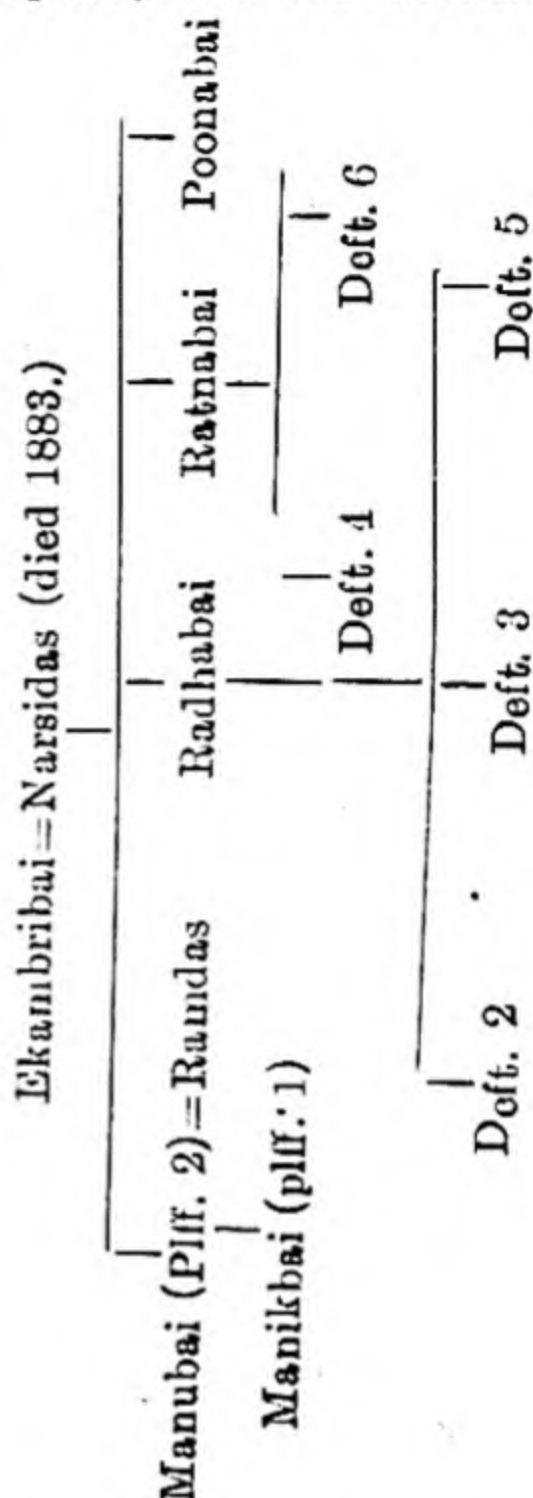
Macleod, C. J.—The plaintiffs sued to recover possession of the plaintiff property after a declaration that plaintiff No. 1 was an owner or in the alternative if plaintiff No. 1 was not an heir that plaintiff No. 2 should be declared the owner.

It was alleged that the property originally belonged to two brothers Narsidas and Shankerdas, but it has been found by the Court below and that finding has not been disputed in this Court, that the brothers were not in union, and so the following pedigree [*vide* next column] will be sufficient for the purposes of this appeal.

The property was held jointly by Narsidas and his son Ramdas Narsidas died in 1883. Ramdas was adopted in 1908 by one Bhagwandas, a first cousin of Narsidas. At the time of his adoption Ramdas had a wife plaintiff No. 2 and a daughter plaintiff No. 1.

The plaintiffs claim that they are entitled to the property originally owned jointly by Narsidas and Ramdas, as against the defendants who are the grandchildren of Narsidas by his daughters Radhabai and Ratnabai.

It was decided in *Kalgauda Tavanappa v. Somappa Tamanganda* (1) that when a married Hindu having a son is given in adoption, the son does not, like his



father, lose the *gotra* and right of inheritance in the family of his birth, and does not acquire the *gotra* and right of succession to the property of the family into which his father is adopted. It was also held that when a married Hindu is given in adoption his wife passes with him into the adoptive family because according to the Shastras husband and wife form one body. The second plaintiff, therefore, can in no case succeed. But the rights of a daughter in the event of her father being adopted have, as far as we can ascertain, not been considered either in texts or reported cases, neither have they been discussed by any of the writers on Hindu law. It is not surprising that the texts are silent on the question as in olden times the adoption of a married man having children would be repugnant to orthodox Hindu customs.

(1) [1909] 33 Bom. 669=3 I. C. 809=11 Bom L.R. 797.

The trial Judge has taken it for granted that the main issue was 'Who was the heir of Narsidas after the adoption of Ramdas?', and it cannot be disputed that the defendants were nearer heirs to Narsidas than plaintiff No. 1.

Para 12 of the judgment says: "After Ramdas left the family by adoption Ekambribai was the heir of Narsidas to whom the property belonged and she lived in the house till her death which took place on September 12, 1912"; and para 75 says: "the property in dispute belonged to Narsidas. Defendants 1, 2, 3, 4 and 6 are sons of the daughters of Narsidas and are his heirs preferably to plaintiff 1 or plaintiff 2." He had some justification for so holding. As in *Ramachandra v. Manubai*, (2) Ramdas attempted to execute a decree obtained by his father. The case came up to the High Court when it was held that Ramdas by his adoption lost all rights in his father's estate which thereafter went to the heirs of Narsidas. The judgment-debtor was the only other party to the proceedings, and the rights of the present plaintiff No. 1 as daughter of Ramdas were never taken into consideration. It would have been sufficient for the Court to decide that Ramdas was incompetent to execute the decree without going on to say in whom the right to execute lay. In any event plaintiff No. 1 is entitled to raise the point in the present suit, the question is not *res judicata*, and the dictum of the High Court being *obiter* must, at the best, be treated with the respect usually attached to such dicta. The trial Judge says: 'By his adoption Ramdas lost all rights of inheritance in his natural family as completely as if he was never born in it. Inheritance must be traced from the previous male holders.'

It is true that his right to the property of his adoptive family accrued as if he had been born in it, and it is equally true that he lost all rights to the property of his natural family. But I think the Judge is led into a fallacy by using the words 'right of inheritance' without regard to the varying circumstances which may exist in different cases. If Narsidas had been alive in 1908 Ramdas would have lost all rights to the family property which he had as co-parcener, and all

rights to succeed to any self-acquired property of Narsidas. The adoption would have put an end to those rights in the same way as if he had died, but it is quite unnecessary to add a further fiction 'as if he had never been born in the family.'

It is unfortunate that when we get within the realm of fiction the ordinary rules of logic no longer apply. If the adopted son is to be considered as having been born in his adoptive family, the ordinary result should follow that he takes the whole of his family then in existence into the adoptive family, but as I have pointed out above he does not take his sons with him, and presumably his unmarried daughters are left behind as well. There can be no difficulty with regard to the rights of the son in his father's property. If father and son are joint the son, on his father's adoption, succeeds by survivorship. If there are other co-parceners the result is the same. If there is a daughter unmarried she is entitled to maintenance and marriage expenses. The difficulty arises when the adopted son is the sole owner of ancestral property as Ramdas was. If he is to be treated as having civilly died in the natural family when he was adopted, the property should go to his heirs, as he was the last male-holder and not to the heirs of his fathers. If in 1908 he had died a natural death, undoubtedly plaintiff No. 1 would have been his heir-ess, and if he is to be treated as dead by a fiction, there can be no possible reason for departing from the ordinary rule of devolution of property under the Hindu law. One result of tracing descent from the next generation above would be, that if Narsidas and his brother Shankardas had been joint, as the plaintiff contended, since Shankardas survived Narsidas the property would go to his heirs and not to the heirs of Narsidas, with the result that Ramdas would have become entitled to the property as son of Bhagwandas, his adoptive father, first cousin of Shankardas, in preference to his brother's son's daughter or his brother's daughter's sons. The fallacy in the passage of the judgment under review lies in the failure to recognize that Ramdas had no right of inheritance to the property of Narsidas to lose. He had already acquired it by survivorship. In *Dattatraya v. Govind*

(2) [1919] 43 Bom. 774=52 I. C. 695=21 Bom. L. R. 776.

(3) it was held on the authority of the text of Manu, Adhyaya 1, verse No. 142, that a Hindu, the sole owner of ancestral property lost his right to the suit property on adoption, but in the case of property acquired by partition it was held in *Mahableshwar v. Subramaniya* (4) that the suit property was not the estate of the natural father within the meaning of the above-mentioned text, and therefore the son was not divested of it on adoption. Consequently the question who would succeed to it if he were divested did not arise. But I expressed the opinion that then the heir of the defendant at the time of his adoption would have had to be ascertained as if he were dead.

In *Dattatraya v. Govind* (3) also the question was not decided as the mother of the adopted son was the heir of her son and also of the father.

Though there is an objection to referring to an adopted son as civilly dead in his natural family (cf. *Sir Rajah Venkata Narasimha Appa Row v. Sri Rajah Rangayya Appa Row* (5)), I cannot see myself that there is any reason in this case for holding that the property should go to the heirs of Narsidas and not to the heirs of Ramdas.

In my opinion, therefore, plaintiff No. 1 is entitled to succeed to her father's property. There will be a decree for possession and an inquiry as to mesne profits from date of suit with costs throughout.

Crump, J.—I agree.

Appeal allowed.

(3) [1916] 40 Bom. 429 = 34 I. C. 423 = 18 Bom. L. R. 258.

(4) 1923 Bom. 297 = 47 Bom. 542 = 25 Bom. L. R. 274.

(5) [1905] 29 Mad. 437 = 16 M. L. J. 178.

1925 BOMBAY 365

MACLEOD, C. J. AND CRUMP, J.,
Bhikaji Laxman—Appellant.

v.

The Secretary of State for India—Respondent.

First Appeal No. 228 of 1923, Decided on 6th January, 1925, from the decision of the Dt. J., Belgaum, in Suit No. 7 of 1921.

(a) *The Bombay Hereditary Offices Act (III of 1874) S. 15*—Widow holding life interest in watan property is not 'holder.'

A widow holding an interest in watan property for the term of her life or until her marriage is not a holder within the meaning of that term in S. 15 of the Act III of 1874. [P 366 C 2, P 367 C 1]

(b) *Bombay Rev. Jurisdiction Act (X of 1876) S. 4 (a)*—Order of commutation of watan services passed without observing *Bombay Hereditary Offices Act, S. 73*—Suit to set aside the order lies.

Where a Collector orders, at the instance of the widow of the last watandar, commutation of kulkarniki services and the procedure prescribed by the *Bombay Hereditary Offices Act S. 73* is not observed by the Collector while passing the order, the order is *ultra vires*. A suit in a Civil Court to set aside the order is not barred by the provisions of the *Bombay Revenue Jurisdiction Act (X of 1876) S. 4 (a)*. [P 367 C 1]

(c) *Bombay Hereditary Offices Act (III of 1879) S. 73*—Non-compliance with the procedure laid down in S. 73 makes order *ultra vires*.

If there is no record of any investigation having been made or if there is nothing to show that an opportunity had been given to the other members of the watan family of being heard or that any reasons were recorded by the Collector for his decision, an order directing commutation is *ultra vires*. [P 367 C 1]

H. C. Coyajee and D. R. Manerikar—for Appellant.

S. S. Patkar—for Respondent.

Macleod, C. J.—The plaintiffs sued for a declaration that the order of commutation of Kulkarniki service in regard to five villages in the Khanapur Taluka of the Belgaum District was *ultra vires* of the Collector and was not binding on them.

The defendant, the Secretary of State claimed that the suit was barred under paras. 2 and 3 of S. 4 (a) *Bombay Revenue Jurisdiction Act*; that the order of commutation of the Kulkarniki service was not *ultra vires* of the Collector; that Laxmibai at whose instance the order was passed was in 1915 the representative of the persons beneficially interested in the watan and was the duly registered representative watandar, and so was a "holder" as defined in clause 4 of S. 15 of *Bombay Act III of 1874*, and that the settlement made with her was therefore legal and binding on her successors, the plaintiffs, under clause 3 of that section.

One Bhikaji Laxman was the sole representative Kulkarniki watandar of seventeen villages, including the five mentioned in the plaint, and his widow Laxmibai had been registered as the sole representative watandar after Bhikaji's death. On September 9, 1878, Laxmibai adopted plaintiff's father Laxman, and two days later passed the adoption deed, Exhibit 19. Laxman's natural father Krishnaji on the same date, September 11, passed an agreement that Laxmibai should enjoy the right of Kulkarniki service in the five plaint villages for the terms of her natural life for maintenance.

Thereafter disputes arose between Laxmibai and Laxman which resulted in a suit being filed, No. 10 of 1896, in which Laxman got a decree that his adoption was valid but Laxmibai's rights under the agreement were preserved. Laxman's name was then entered in the register as watandar for twelve out of the seventeen villages, but Laxmibai's name was retained for the five plaint villages. In 1913 Laxman died leaving a widow Sitabai and two minor sons, the present plaintiffs. On January 24, 1915, Laxmibai applied to the Collector to commute the right of Kulkarniki service with respect to the plaint villages. On that application the commutation order was passed by the Collector. Laxmibai died on November 25, 1917, and thereafter Sitabai as plaintiffs's guardian asked the Assistant Collector to cancel the commutation order. This was refused, and the refusal was confirmed by an order of the Commissioner, and also by Government. Sitabai then gave notice that she would file a suit. Eventually the present suit was filed on September 16, 1921.

The District Judge has dismissed the plaintiff's suit on the ground that it was barred by S. 4 (a) of the Bombay Revenue Jurisdiction Act. Assuming that it is a suit to obtain a declaration that the order of the Collector was *ultra vires*, and therefore null and void and not binding on the plaintiffs, the question is whether the plaintiffs are not entitled to prove certain facts which would justify the Court in granting them the declaration asked for in spite of the provisions of S. 4 (a) of the Bombay Revenue Jurisdiction Act.

In *Maganchand v. Vithalrav* (1) the Court found that the Assistant Collector's order, purporting to be made under S. 11 of the Hereditary Offices Act, was unauthorized, and therefore held that that order was no bar to the maintenance of the plaintiff's suit. Relying on that decision, two points have been taken by the appellants' counsel before us:—(1) that Laxmibai was not the 'holder' of the watan within the meaning of that term in S. 15 of Bombay Act III of 1874; and (2) that the provisions of S. 73 of the Act had not been complied with, and that, therefore, the order passed by the Collector directing commutation of the watan

was not a proper order, so that the provisions of S. 4 (a) of the Revenue Jurisdiction Act did not apply. It does not appear that when Act III of 1874 was passed, it was contemplated that the widow of a watandar could succeed to him as watandar. "Watandar," according to S. 4 of the Act, means a person having an hereditary interest in a watan. It includes a person holding watan property acquired by him before the introduction of the British Government into the locality of the watan, or legally acquired subsequent to such introduction, and a person holding such property from him by inheritance. It includes a person adopted by an owner of a watan or part of a watan subject to the conditions specified in Ss. 33 to 35. "Representative Watandar" means a watandar registered by the Collector under S. 25 as having a right to perform the duties of an hereditary office. Although Laxmibai was registered under S. 25 as representative watandar, it does not follow that she was a watandar within the meaning of that term in S. 4, which includes for the purposes of the section any sole owner or the whole number of joint owners or any person dealt with as representative of the person beneficially interested or entered as such in the Government record at the time of the settlement, and it does not follow that she was a 'holder' within the meaning of that word in S. 15 of the Act. By S. 2 of Bombay Act V of 1886 "Every female member of a watan family other than the widow, mother or paternal grandmother of the last male owner, and every person claiming through a female, shall be postponed in the order of succession to any watan, or part thereof or interest therein, devolving by inheritance after the date the Act comes into force, to every male member of the family qualified to inherit such watan, or part thereof or interest therein. The interest of a widow, mother or paternal grandmother in any watan or part thereof shall be for the term of her life or until her marriage only." Therefore the interest of the widow in a watan is to be compared to the interest of a Hindu widow in her husband's estate. I doubt whether it was ever intended that the Government should be able to treat the widow as a watandar for the purposes of sanctioning the commutation of the watan service. In my opinion a widow holding an interest in watan property for the term

(1) [1912] 37 Bom. 37=17 I. C. 148=14 Bom. L. R. 793.

of her life or until her marriage is not a "holder" within the meaning of that term in S. 15 of the Act III of 1874.

It would follow, therefore, that the Collector negotiating with a person who was not a holder of the watan was not authorised to pass a commutation order under S. 15 of the Act and the decision in *Maganchand v. Vithalrav* (1) is applicable to this suit.

A further objection arises from the fact that the Collector had not complied with the provisions of S. 73 of the Act. That section is imperative and enacts that "No order under Part III directing commutation of a watan...shall be passed, unless after an investigation recorded in writing and a proper opportunity afforded for the hearing of claims and the production of evidence. In each such investigation, the Collector or other officer shall record his decision with the reasons therefor in his own handwriting." It is admitted that there is no record of any investigation having been made, or that any opportunity had been given to the other members of the watan family of being heard, or that any reasons were recorded by the Collector for his decision. The learned Judge considered that as the claimants did not take this point in the appeals to the revenue authorities, and as it was not set out specifically in the plaint, he was entitled to consider that the Collector had duly complied with the provisions of S. 73. Although it may be said that the plaintiffs did not specifically rely upon this fact in asking the Court to hold that the order was *ultra vires*, still in para 5 of the plaint it is stated that the Collector made a settlement of commutation some time in 1915 without giving notice to the minor plaintiffs or their guardian, so that the question whether the Collector had complied with the provisions of S. 73 was in issue. I think, therefore, that as the provisions of S. 73 had not been complied with, any order of commutation passed by the Collector would not be a valid order, so that on this ground also the suit to set it aside will not be barred under S. 4 (a) of the Revenue Jurisdiction Act. In my opinion, therefore, the plaintiffs are entitled to succeed, and the appeal should be allowed, and the declaration, which the plaintiffs asked for, decreed with costs in both Courts.

Crump, J.—I agree.

Appeal allowed.

1925 BOMBAY 367

MACLEOD, C. J. AND CRUMP, J.

Manilal Jibhai—Plaintiff—Appellant.

v.

Ishvarbhai Samalbhai — Defendant — Respondent.

Second appeal No. 438 of 1923, Decided on 8th December 1924, from the decision of the Sub. J., Ahmedabad in Appeal No. 224 of 1922.

Civil P. C. S. 91—Suit for removal of encroachment in public street—Plaintiff unable to prove that the rest of the street cannot be used—Suit is not maintainable.

Plaintiff filed a suit to have declaration that the land described in the plaint was street land and to obtain a mandatory order directing defendant to remove an *otla* made by him on the land,

Held; that such a suit at the instance of a private person is not maintainable unless he is able to show that he is unable to use the road, nor can he seek the assistance of the Court to get the *otla* removed, merely because he wants to walk over that portion of the street occupied by the *otla*, unless he proves special damage.

[P. 368, C. 1.]

H. V. Divatia—for Appellant.

M. H. Mehta—for Respondent.

Judgment.—The plaintiff filed this action to have a declaration that the land described in the plaint was street land and to obtain a mandatory order directing defendant No. 1 to remove an *otla* made by him on the land. The Municipality of Nadiad city, in which the property was situated, was made a party defendant. Defendant No. 1 asserted that his *otla* existed since a long time; that plaintiff had no interest in the land; that the land was held to be of his ownership by the City Survey Officers and that no damage was caused to the plaintiff.

The trial Court held that the suit land was a public street and that plaintiff was entitled to sue to have the encroachment made by defendant No. 1 thereon removed.

The first defendant appealed. In his judgment, the Judge said:—

"Assuming that the *otla* land forms part of a public street land, the question is whether defendant No. 1's act amounts to a public nuisance. I think, it does, vide I. L. R. 20 Mad. p. 433 and 24 Bom. L. R. p. 807, which lay down that appropriation of a part of a public road or building on it, amounts to a public nuisance. Plaintiff is, therefore, not competent to sue without complying with the provisions of S. 91 of the Civil Procedure Code."

Accordingly he allowed the appeal and reversed the decree of the trial Court.

The appellant contends that although the *otla* was a public nuisance, the plaintiff was entitled to an injunction restraining the defendant from using that part of the road occupied by the *otla* without proving special damage. He relies upon the decision of this Court in *Baslingappa Parappa v. Dharmappa Basappa* (1)

"Plaintiffs sued on behalf of themselves and of other members of a religious community to have a declaration of their right of marching in procession with a car along a particular public road to certain temples and for an injunction restraining the defendants from interfering with the plaintiffs. The defendants contended that the plaintiffs had no right to march along the road. The lower Courts dismissed the suit on the ground that the road being public the plaintiffs could not sue unless special damage were shown and proved."

On second appeal by the plaintiffs it was held, reversing the decree and allowing the claim, that the suit was not for removal of a public nuisance but for a declaration of the right of an individual community to use the public road. Every member of the public and every sect has a right to use the public streets in a lawful manner and it lies on those who would restrain him or it to show some law or custom having the force of law abrogating the privilege."

The question here is an entirely different one. The plaintiff does not seek for a declaration that he has a right to use a public road, nor can he say that such a right has in any way been obstructed. But he wishes to make a claim to a right to pass over the particular portion of the road occupied by the *otla*, though his right to use the rest of the road has not been interfered with. He cannot sustain the suit, as he has not been able to show that he is unable to use the road, nor can he seek the assistance of the Court to get the *otla* removed, merely because he wants to walk over that portion of the street occupied by the *otla*, unless he proves special damage.

The appeal is, therefore, dismissed with costs.

Appeal dismissed.

★ 1925 BOMBAY 368

MACLEOD, C. J. AND COYAJEE, J.
Saibai Govind Lavlekar—Appellant.

v.

Balkrishna Pandurang Bane—Respondent.

Second Appeal No. 277 of 1923, Decided on 13th Jan 1925, from Jt. J. Poona.

★ Civil P. C., O. 16, R. 1—*Plaintiff applying for summons to witnesses eleven days prior to hearing—Court is bound to issue summons.*

Where the plaintiff applied for summonses to witnesses eleven days prior to the date fixed for hearing and the Court dismissed the application.

Held: the dismissal was wrong. [P. 368, C. 2]

A. G. Desai—for Appellant.

A. G. Sathaye—for Respondent.

Judgment.—This suit was filed so far back as April 2, 1917. For one reason or another the hearing of the suit was not fixed until April 13, 1921. On April 2, 1921, the plaintiff applied that summonses should be issued to the persons mentioned in the list of witnesses filed in the Court. The learned Judge said:—

"The application is made at too late a stage in this suit. It is not possible to get the summonses served in time as the date fixed is only April 13, 1921. No satisfactory reason is given for calling for the original record of Government. The application is rejected with costs on the plaintiff."

Thereafter the suit was heard and dismissed with costs. The appeal met the same fate.

Unfortunately the attention of neither of the learned Judges was called to the decision of this Court in *Bai Kali v. Alarakh Pirbhai* (1), where it was held that "under S. 159 of the Civil Procedure Code (XIV of 1882) a party to a suit was entitled, as of right, to obtain summonses any time before the date fixed for the disposal of the suit". S. 159 of the old Code is now Order XVI, rule 1, of the Code of 1908, and consequently the Judge was bound to issue summonses to the witnesses according to the application of the plaintiff. If then an adjournment had been asked for at the hearing because the witnesses mentioned in the list, filed on April 2, 1921, did not attend, the Court would have considered whether it should be granted. We must, therefore, set aside the decree of the lower appellate Court and remand the suit to the trial Court for a retrial. All costs to be costs in the cause.

Case remanded.

(1) [1910] 34 Bom. 571 || 7 I. C. 653=12 Bom. L. R. 586.

(1) [1890] 15 Bom. 86.

1925 BOMBAY 369

SHAH, AG. C. J.

Royal Bank of Scotland—Plaintiff.

v.

Rahim Cassum and Son—Defendants.

O. C. J. No. 310 of 1923, Decided on 18th October, 1924,

Negotiable Instrument's Act, S. 9—Holder having lien on the bill is a holder for value—Bills of exchange Act, (45 & 46 Vict. C. 61) S. 27 (3).

A person holding a bill of exchange sent to him for collection with a lien on the bill is a holder for value or for consideration. [P 370 C 2]

*Kemp—for Plaintiff.**B. J. Wadia—for Defendants.*

Judgment.—This suit came on for hearing as a contested short cause on August 30, 1923, before Mr. Justice Coyajee when issues were raised. On that day the plaintiffs found it necessary to ask for an adjournment to have evidence relating to a certain letter of lien passed in their favour by Marshall & Co., Glasgow, taken on commission and the case was adjourned. It has now come on for hearing before me. After recording evidence and hearing arguments on October 15, I reserved judgment. I ordered the case to be set down for further arguments to day. I have heard further arguments and have recorded further evidence of the defendants as to certain facts relating to the presentation of the bill for acceptance which were adverted to in the course of the arguments.

The material facts relating to this suit are really not in dispute and are sufficiently proved. The defendants are dealers in crockery and glassware in Bombay. They indented certain goods through Marshall & Co., Bombay Branch, from Marshall & Co., Glasgow. Marshall & Co. sent certain goods in pursuance of these indents and on March 23, 1921, they drew a bill of exchange to the order of themselves for £ 167-9-0 payable at sixty days after sight "documents against payment". The defendants were the drawees and Marshall & Co. (Bombay) were drawees in case of need. Messrs. Marshall & Co. (Glasgow) indorsed the bill in blank and sent it on to their bankers, the Royal Bank of Scotland (Glasgow), for collection. The

1925 B 47 & 48

Bank sent this bill to their London Office. The bill bears the endorsement "remitted for collection by Royal Bank of Scotland, London Office," to the Mercantile Bank of India, Bombay. The bill was presented by the Mercantile Bank of India, Bombay, to the defendants. But, according to the evidence on behalf of the defendants which I accept, the bill was not accepted by them but returned to the Bank. The Bank then referred the matter to the Bombay Branch of Marshall & Co., who were mentioned in the bill as drawees in case of need. Marshall & Co., Bombay Branch, then took this bill to the defendants' firm. At that time the term "documents against payment" was altered to "documents against acceptance" which is noted in pencil on the bill, and the bill was accepted by the defendants. The indorsement of acceptance is in these terms: "Accepted. Payable at the office of the Mercantile Bank of India, Limited, Bombay." The documents were then handed over to the defendants. The due date for payment was June 23, 1921. No payment was made on that day and the fact of the bill having been dishonoured for non-payment was duly noted on June 24. Though at one stage a point was made that the dishonouring for non-payment was not proved, it has been accepted before me as a fact and it is clear from the protest attached to the bill that it was dishonoured for non-payment on behalf of the drawees as well as on behalf of the drawees in case of need.

Subsequently, defendants had some correspondence with the local branch of Marshall & Co. with reference to the goods indented by them. In the result the defendants asked Marshall & Co. to secure certain payments from the Insurance Company; and as a fact Marshall & Co. (Glasgow) realised £ 18-4-2 from the Insurance Company in September 1921. The defendants made payments amounting in all to Rs. 1,500 in three items of Rs 500 each to Marshall & Co., Bombay Branch. Before the further payment of Rs. 500 was made apparently Marshall & Co. failed in November 1921 and the last cheque of Rs. 500, which has been referred to in the evidence, was cancelled. After the adjudication order, the present plaintiffs, who are the Royal Bank of Scotland, received Rs. 500 from the

trustee of the drawers' estate in part payment of this bill some time before August 1923. The Mercantile Bank made a demand for the sum in respect of this bill in April 1922 on the defendants.

Ultimately the present suit was filed by the Royal Bank of Scotland to recover the sum due from the defendants on the bill of exchange as holders in due course.

The defendants pleaded that the plaintiffs were merely agents for collection, that they throughout dealt with Marshall & Co., Bombay Branch, in respect of this bill, that they made substantial payments in respect of this bill to the Bombay Branch of Marshall & Co., that the plaintiffs were not holders in due course and that in any case the payments made by them to Marshall & Co., Bombay Branch, should be given credit for in this suit.

The difficulty has arisen in the case on account of the insolvency of Marshall & Co.

On these pleadings five issues have been raised: but the most important issue in the case is whether the plaintiffs are holders in due course. I shall deal with that question first.

On a consideration of the arguments and the provisions of the Negotiable Instruments Act, to which reference has been made, I have come to the conclusion that the plaintiffs were holders in due course. The expression "holder in due course" means any person who for consideration became the possessor of a promissory note bill of exchange or cheque payable to bearer. I need not refer to the second part of definition of this expression, as I do not think that it can apply to the facts of this case. The indorsement on the bill of exchange by Marshall & Co. is an indorsement in blank as defined by S. 16 of the Negotiable Instruments Act. The name of the Royal Bank of Scotland is not mentioned as indorsee and the indorsement in blank has not been converted into indorsement in full as contemplated by S. 49 of the Negotiable Instruments Act. It is a bill on which the only indorsement is an indorsement in blank. Having regard to explanation (2) of S. 13 as amended, it is clear that this bill was at the date of the presentation payable to bearer though originally drawn as payable to the order of the drawers. The instrument was handed over to the Bank for collection with the indorsement in blank.

Thus the plaintiffs became holders thereof. They were holders for consideration. It is proved in the case that Marshall & Co. had current account with this Bank, and it is common ground that Marshall & Co. were indebted at the time and afterwards to a large extent far in excess of the amount of the bill. The letter of lien, which is proved by the evidence recorded on commission, shows that they were entitled to a lien on this bill in respect of the amount due to them. That letter distinctly gives a lien to the Bank over all bills which might be sent to them for collection and also expressly mentions that they would have the right to sue in respect of those bills. It is also clear on the evidence that when this bill was sent for collection to the plaintiffs by Marshall & Co. they wrote to the defendants here informing them of the fact that the bill was sent for collection to the plaintiffs. The bill, as I have already stated, was presented in the first instance by the Mercantile Bank of India on behalf of the plaintiffs to the defendants. According to the provisions of S. 27, subsec. (3), of the Bills of Exchange Act, 1882. (45 & 46 Vic. c. 61) undoubtedly the plaintiffs would be holders for value, and it is not contested, and it cannot be contested, that having regard to the definition of "consideration" according to the Indian Contract Act, the Bank holding the bill for collection with a lien on the bill would be holder for consideration. It may be that Marshall & Co. sent the bill for collection to them, but, having regard to the state of their account with the Bank and their agreement with the Bank, the Bank would have a right in respect of the amount of this bill. It is not necessary to refer to the cases bearing on the question as to whether the Bank would be holder for value when such a bill is sent to them for collection prior to the statute of 1882 as the law has been stated in sub sec. (3) of S. 27 of the statute: and here we are governed by the definition of "consideration" according to the Indian Contract Act. I may mention, however, that even prior to that enactment the position of a holder, to whom the drawer was indebted, obtaining possession of a bill of exchange payable at a future date has been clearly stated in the case of *Currie v. Misa* (1). The law with regard to the bill of exchange payable at the

(1) [1875] L.R. 10 Ex. 153=1 A.C. 551.

future date has been stated in both the judgments. In the judgment of Lord Coleridge, C. J. it is pointed out that it is too late to dispute that a pre-existing debt due to the transferee of a bill entitles him to all the rights of a holder for value. I am, therefore, satisfied that the plaintiffs were holders for value, that is, for consideration. There is no specific provision in the Indian Negotiable Instruments Act corresponding to S. 27, sub-section (3) but there can be no doubt that the law in India is not different on this point. There is also the presumption mentioned in S. 118, according to which a holder is to be presumed to be a holder in due course until the contrary is proved.

That being so, it is clear that they are entitled to sue the acceptor in respect of this bill; and unless their position as holders in due course was in any sense modified in law by the fact that Marshall & Co., Bombay Branch, intervened in the matter and got the bill accepted it is clear that they must succeed in the suit.

As regards the point made by Mr. Wadia on behalf of the defendants that the bill was really presented to the defendants by Marshall & Co., Bombay Branch, and accepted at their instance and subsequent payments were made to Marshall & Co., by the defendants in respect of the goods on that understanding, I have come to the conclusion that the legal position of the plaintiffs as holders in due course is not altered thereby in any way and that the defendants cannot claim to set off those payments against the amount of the bill. It is undoubtedly a case of hardship in the sense that the defendants have paid certain sums to Marshall & Co. to whom the money was payable in respect of the goods. But the defendants were duly informed of the fact that the bill was sent for collection to the plaintiffs, and though the term "documents against payments" was altered at the time the indorsement for acceptance was made, the bill must be deemed in my opinion to have been presented on behalf of the plaintiffs by the Mercantile Bank. The alteration in the term "documents against payment" does not affect the plaintiffs' rights to recover on the bill so long as the plaintiffs do not object. I do not see how the defendants can complain of this alteration which was assented to by them and made at their instance. Whatever the rights as between the defendants and the original drawers of the

bill may be in consequence of the payments, which are proved to have been made by the defendants to Marshall & Co., I do not see how according to law the defendants can get credit for these payments in a suit by the holder in due course in respect of the bill accepted by them. Unfortunately the defendants made payments to Marshall & Co., after accepting the bill without a proper realisation of their legal liability in respect of the bill as acceptor to the holder in due course.

I shall now deal briefly with the issues as framed. On the first issue my finding is in the affirmative.

As regards the second issue my finding is in the negative. Though the bill was sent to them for collection by Marshall & Co., Glasgow, I cannot say that they were merely collecting agents in the sense that they had no other right or interest in respect of the bill. On this ground my finding is against the defendants.

My finding on third issue is in the affirmative. I cannot see how the maintainability of the suit by the plaintiff can be affected by the bankruptcy of Marshall & Co., and in fact this point has not been pressed.

I have already stated my reasons in respect of the fourth issue and my finding is in the negative.

As regards the fifth issue my finding is in the negative. Though a copy of the letter, dated June 22, 1922, has been produced on behalf of the plaintiffs, no attempt has been made to prove that the letter was in fact delivered to the defendants; and in the course of the arguments Mr. Kemp did not press that point. I have not overlooked the fact that there was a demand by the Mercantile Bank of India in April 1922. At the same time I may add that it can make no difference in the result whether the demand was made or not.

Deducting the sum of Rs. 500, which has been admittedly received by the plaintiffs in respect of this bill, there will be a decree for Rs. 2,134 8 7 with interest at eight per cent. per annum from June 23, 1921, to this date, and costs and interest on judgment at six per cent. per annum.

As regards the costs of the commission, strictly perhaps the plaintiffs may be entitled to those costs. Having regard to the circumstances of the case, I think it is rather hard upon the defendants that they should have to pay the costs of the

commission ; and I am not quite satisfied that the plaintiffs might not have produced better materials here before taking out a commission, which might have afforded *prima facie* proof of the letter of lien and which might have dispensed with the necessity of the commission. Under the circumstances I direct that the costs of the commission should be borne by the plaintiffs.

Suit decreed.

1925 BOMBAY 372

MACLEOD, C. J. AND COYAJEE, J.

Dnyanu Yesu Jagdale — Defendant—Appellant.

v.

Vishnu Parsharam Chitnis—Plaintiff—Respondent.

Second Appeal No. 766 of 1923, Decided on 29th January, 1925, from the decision of the Dt. J., Satara, in A. No. 307 of 1922.

Limitation Act, Art. 44—Joint Hindu family—Alienation of property by elder brother as manager—Sue by a minor brother on attaining majority for recovery of property—Art. 44 does not apply.

Manager of a joint Hindu family consisting of himself and his two minor brothers is not a guardian within Art 44. 34 All. 213 P. C. Fol.

[P. 312, C. 2]

K. H. Kelkar—for Appellant.

G. N. Thakor and *G. K. Gadgil*—for Respondent.

Judgment.—The plaintiff's father died leaving a widow and three minor sons. The plaintiff was the second son. His elder brother at the age of nineteen took charge of the family estate of the Hindu coparcenary. On July 7, 1908, he passed a certain sale deed which the plaintiff seeks to avoid in the present suit. Subsequently the elder brother died and also the younger brother leaving the plaintiff and his mother the sole representatives of the family. The plaintiff sued to recover possession of the property specified in the plaint and for a declaration that the transaction entered into by the deceased Ganesh Parashram was void and without consideration and illegal and that if it was held binding to the extent of the one-fourth share of Ganesh, a declaration to that effect might be given to him. The suit was dismissed on the plea of limitation the Lower Court holding that the suit had not been instituted within the time prescribed under Art. 44 of the Indian Limitation Act.

In appeal the judge said:—

"In my opinion although Ganesh styled

himself in the sale deeds a guardian of his minor brothers, he did not enter into this transaction as guardian but as the manager of the Hindu coparcenary. The distinguishing feature of the coparcenary under the Mitakshara law is unity of ownership. The whole body of the coparceners are the owners of the property, and no coparcener can say that he owns any definite share. As regards property of this kind, there can be no guardianship. Article 44 applies in specific terms to guardians and wards. As it restricts the ordinary period of limitation it should be construed strictly."

Accordingly he reversed the decree of the trial Court and ordered the plaintiff to recover the possession of the property in suit and gave the defendants a declaration that they were entitled to sue for partition of a one-fourth share.

The trial Judge in finding that Art. 44 applied to the plaintiff's suit appears to have relied on a Full Bench decision of this Court in *Fakirappa v. Lumanna*, (1) where it was held "that the minor, not having sued to set aside his mother's alienation within three years of his attaining majority was not competent to dispute the alienation ever afterwards; and that much less could the plaintiff do so." On reading the judgment in that case, it is difficult to find any foundation for the Judge's conclusion that it applied to the facts in the present case where several brothers constituted a joint Hindu family, and though undoubtedly the elder brother was the manager of the family he was not the guardian either *de facto* or *de jure* of his minor brothers. But even assuming for the purpose of the argument that he might be styled the *de facto* guardian that would not make him a guardian within the meaning of the words in Art. 44 of the Indian Limitation Act. For that the authority is *Mata Din v. Ahmad Ali* (2). Consequently Art. 44 was not applicable to the transactions in this case, and the plaintiff was entitled to succeed. The appeal, therefore, must be dismissed with costs.

Appeal dismissed.

(1) [1910] 44 Bom. 742=53 I. C. 257=22 Bom. L. R. 680.

(2) [1912] 34 All. 213=39 I. A. 49=10 C. W. N. 338=11 M. L. J. 145=(1912) M. W. N. 188=9 A. L. J. 215=13 I. C. 190=15 C. I. J. 210=14 Bom. L. R. 192=15 O. C. 49=23 M. L. J. 6 (P. C.)

★ 1925 BOMBAY 373

MACLEOD, C. J. AND COYAJEE, J.

Imambhai Kamrudin and others—Plaintiffs—Appellants.

v.

Rahimbhai Usmanbhai and others—Defendants—Respondents.

Second Appeal No. 487 of 1923, Decided on 30th January, 1925, from the decision of the Dt. J. Ahmedabad, in Appeal No. 269 of 1922.

★-Party wall—Raising party wall by one with acquiescence of the other adjoining owner and opening windows therein—Trespass committed—Act 120 applies—Limitation Act, Art. 120.

"If one of two neighbouring owners raises a party wall, the other owner giving his consent or acquiescing, then the raised portion must assume the same character as the old party wall on which it stands and therefore neither party can be allowed to commit a trespass on the party wall so increased, e. g., by opening windows therein. A suit for injunction directing the defendant to close the windows so opened is governed by Art. 120 and must be brought within 6 years of the opening of the windows. [P 374 C 2]

M. H. Mehta—for Appellants.

H. V. Divatia—for Respondents.

Judgment.—The plaintiffs sued for an injunction against the defendants directing them to close up the windows which they had opened in the joint wall, and for permission to the plaintiffs to do so at the defendants' costs if they failed to close up the windows, and to restrain the defendants from making any new openings etc., in the said common wall.

The defendants contended that the wall in which the windows in the suit were opened had not been of joint ownership; that the plaintiffs were not prejudiced in any way; and lastly that the plaintiffs filed the suit about twelve years after the windows had been opened.

The first issue in the trial Court was whether the wall between the two houses had been proved to be of joint ownership. The Judge found on the facts that the wall up to the roof of the plaintiff's house was old, and was of joint ownership, but that the plaintiffs had to admit that some years ago the wall had been raised by the defendants' ancestors at their own expense. The owner of plaintiff's house not only acquiesced in the raising of that wall but had a knowledge of his doing so and did not protest. The suit having been filed after his death and that of Usmanbhai,

nobody was in a position to say what arrangement there was between them, when Usmanbhai raised the wall above the roof at his own expense. The learned Judge continued :—

"The old wall is a common wall. Thus assuming that the new wall is also a party wall, it could not be said that there is an ouster by the opening of the windows. At the same time, *Watson v. Gray* (1), quoted with approval in *Kanakayya v. Narasimhulu* (2), would show that the raised portion could not be called a party wall of joint ownership. The ruling in *Motilal v. Maganlal* (3) is based on a specific agreement on defendants' part not to pay his share of expenditure which was not proved. There is nothing to show that there was consent of Ismaili or that this raising of the wall was necessary for the benefit of his house. From any point of view I find that plaintiffs should not be allowed any injunction."

The Judge, therefore, dismissed the suit.

In appeal the District Judge said :—

"The first question that arises is whether the raised portion of the wall becomes a common party wall. It was erected by the defendants at their own expense. There is no evidence whether there was any arrangement between the defendants' ancestor and the plaintiffs' when the wall was raised or whether they consented to the defendants' ancestor raising the wall. At the outset it may be said that there was an acquiescence on the part of the plaintiffs in standing by. In these circumstances what is the character of the portion of the wall thus raised? No doubt under the rule enunciated in *Watson v. Gray* (1), the plaintiffs could have compelled the defendants' ancestor to demolish the raised portion of the wall. But they did not do so. The result is, as stated by Parker, J. in *Kanakayya v. Narasimhulu* (2) that the newly erected portion will not be a common or party wall, but will be the exclusive wall belonging to the defendants. The ruling in *Motilal v. Maganlal* (3) does not militate against this view. All that it lays down is that the old party wall, even though rebuilt by a tenant in common at his own expense, does not cease to be a common party wall. That

(1) [1880] 14 Ch. D. 192 = 49 L. J. Ch 243 = 42 L. T. 294 = 28 W. R. 438 = 44 J. P. 537

(2) [1895] 19 Mad. 38.

(3) [1888] P. J. 297

ruling says nothing about the portion of the wall newly raised by a tenant-in-common at his own expense. If then the raised portion of the wall did not become a common or party wall, the defendants have acquired an exclusive right to it by adverse possession for more than twelve years. There was, therefore, no trespass or ouster when the defendants opened the windows in the wall."

Accordingly the appeal was dismissed.

In *Kanakayya v. Narasimhulu* (2) the plaintiffs and defendants were tenants-in-common of a party wall. The defendants without the consent of the plaintiffs, intending to build a superstructure on their tenement, raised the height of the party wall. A suit was brought to compel the removal of the newly erected part of the wall. The District Munsif dismissed the suit, and his decree was confirmed by the Subordinate Judge. In appeal Parker, J. said :

"The plaintiffs are entitled to the relief asked for. It is true that the refusal of plaintiffs to give the required permission may be ill-natured and that the raising of the wall will not really harm them ; but, at the same time, the altered wall is no longer the same wall and the newly-erected portion will not be a common or party-wall. The erection of it might give rise to inconvenience and quarrels."

In *Watson v. Gray* (1) the owners in fee of two adjoining houses derived title to them from a common predecessor-in-title. The conveyances from that predecessor to the two owners respectively, contained a declaration that the wall which divided the yards at the back of the two houses should be and remain a party wall. It was held that the two owners were tenants-in-common of the wall. The plaintiff had complained that the defendant had committed trespass in that he had knocked down the new piece of wall which the plaintiff had built on the top of the party wall. The plaintiff claimed damages for the removal of the new piece of wall, and an injunction to restrain the defendant from interfering with the rebuilding of it, and it was held that the defendant's action did not amount to a trespass and the plaintiff was not entitled to any damages in the throwing down of the wall.

But the real question on the facts here is, what is the nature of the wall added

by the defendants' ancestor with the acquiescence of the plaintiffs' predecessor-in-title, and it seems to us that if one of two neighbouring owners raises a party wall, the other owner either giving his consent or acquiescing, then the raised portion must assume the same character as the old party wall on which it stands. Then it would follow that neither party can be allowed to commit a trespass on the party wall so increased in height, and the defendant's action in opening the windows in the raised part of the party wall would be a trespass. The plaintiffs could have objected to the windows being opened in the party wall, but not having done so within the period of six years, the suit, coming within Article 120 of the Indian Limitation Act, would be barred. With all due respect, therefore, we cannot agree with the District Judge who says that the newly erected portion is not a common or party wall, nor with Parker, J. who held in *Kanakayya v. Narasimhulu* (2) that where one neighbour had not consented to the new erection by the other, the new erection became the exclusive property of that other. Consequently we think that the plaintiffs would have been entitled to an injunction if they had sued within time. Nor do we think that the defendants in the circumstances of this case have acquired an exclusive right to the newly erected portion by adverse possession. They are only protected against an action by the plaintiffs for trespass owing to the opening of the windows. We think, therefore, though on different grounds, that the lower appellate Court was right in dismissing the plaintiffs' suit, and this appeal must be dismissed with costs. With regard to the future it is desirable that these two neighbours should arrange their disputes and come to some amicable settlement with regard to the party wall. It is clear that the plaintiffs would be entitled to block the suit windows from their own side of the premises and if the occasion arose they would be entitled to an injunction restraining defendants from making any openings in the common wall.

Appeal dismissed.

1925 BOMBAY 375

MACLEOD, C. J. AND CRUMP, J.

Vishnu Ramchandra Deshpande —
Plaintiff—Appellant.

v.

Tukaram Ganu Bogar and others—De-
fendants—Respondents.Second Appeal No. 591 of 1923. Deci-
ded on 5th December 1924, from the de-
cision of the Dt. J., Satara, in Appeal
No. 381 of 1921.*Landlord and Tenant—Watan lands—Tenant of
watan lands cannot acquire right to fixity of
rent by adverse possession.*A person who is in possession of the watan
lands as a tenant of the watandar cannot acquire
a right by adverse possession to fixity of rent,
1923 P. C. 205 *Foll* [P 376 C 1]Even if he were to acquire a right of fixity
of rent as against the immediate holder of the
watan that would not prevail against the next
holder. [P 376 C 2]*K. N. Koyajee*—for Appellant.*G. S. Rao*—for Respondents.**Macleod, C. J.**—The plaintiff sued
to obtain possession of the lands des-
cribed in the plaint, or in the alternative
for a declaration that he as inamdar was
entitled to demand enhanced rent from
the defendants, stating that the lands be-
longed to the Deshpande family as inam
watan lands.The defendants admitted that the lands
were watan inam lands; but they contend-
ed that the lands belonged to them as
their ancestral properties; that they were
in possession from ancient times; that
the ancestors of the plaintiff had got the
right to recover the Government assess-
ment only from them and accordingly
they used to pay Rs. 31-32 only in the
Khata of Ramchandra Gopal for the Judi;
that they were not annual tenants; that
no proper notice was given to them by
the plaintiff; that the father of the plain-
tiff had instituted Suit No. 34 of 1891
against their ancestors; that in that suit
their ancestors had claimed the lands as
of their ownership; and that since then
they were in possession adversely to the
plaintiff and his father for more than
twelve years.It was found in the lower Court that
the lands in dispute were the watan inam
lands of the plaintiff's family, that on
account of the antiquity of the defendants'
tenancy there was no satisfactory evi-
dence of its commencement, and there-fore under S. 83 of the Bombay Land
Revenue Code the presumption arose that
as against the inamdar's family there was
fixity of tenure. The learned Judge
said:—"I therefore held that the defendants
are permanent tenants. The usage to
enhance the rents of permanent tenants
is very widely known and well under-
stood. Such tenants are liable to have
their rents enhanced by their landlords.
22 Bom. L. R. 717."He held that the plaintiff's suit was
not barred by adverse possession and that
the defendants were liable to pay the
enhanced rent. Accordingly he gave a
decree to the plaintiff for Rs. 65 for the
year 1917-18.

In appeal the learned Judge said:—

"The plaintiff's right to enhance was
distinctly denied in Suit No. 34 of 1891 in
the written statement Exhibit 88. The
suit was dismissed owing to a compro-
mise. Then in 1911 they were still ob-
durately denying the right to enhance.
This is clear from the notice Exhibit 72.
This state of things continued until the
present suit. Thus for twelve years and
more before suit the right to enhance
was adversely held against the plaintiff."Accordingly the plaintiff's suit was dis-
missed.We have been referred to the Full
Bench decision of this Court in *Radha-
bai v. Anantav Bhagvant Deshpande* (1),
in which it was held that in the absence
of fraud and collusion adverse possession
for twelve years during the life time
of one holder of service watan lands
would be a bar to succeeding holders.
The contest in that case was between an
entire stranger holding adverse posses-
sion of the watan lands on the one hand
and the watandars on the other.
There must be a distinction with regard
to the question of adverse possession
when the contest is between a tenant al-
ready in possession of the watan land as
a tenant and the watandar.In *Gopalrao v. Mahadevrao* (2) it was
held that the inamdar's right to enhance
the rent and to recover the land in de-
fault of payment of such rent was bar-
red by limitation, the tenant so far as
the right was concerned having been hold-
ing adversely to him for more than twelve
years. No reasons were given for this

(1) [1895] 9 Bom. 198 (F. B.)

(2) [1895] 21 Bom. 304.

decision and the Court merely said (p. 396 of I. L. R.)

"The defendant, therefore, so far as the right of the plaintiff to enhance the rent and to evict the defendant in default of payment is concerned, has been holding adversely to the plaintiff for more than twelve years, and the plaintiff's right to enhance the rent and to recover the land in default of payment of such rent has become lost by operation of the law of limitation."

The question whether persons, who and whose predecessors-in-title, claimed to be, and were, tenants of service watan lands would acquire title to a permanent tenancy of the lands by adverse possession as against the watandars from whom they held was considered in *Madhavrao v. Raghunath* (3). The case of *Radhabai v. Anantrav* was distinguished. Their Lordships said (p. 214):—

"A careful consideration of Sir Charles Sargent's judgment as given at page 210 of the report, shows that he was considering the question referred to the Full Bench from the point of view of the grantee having been a stranger to the watan. It is not necessary for their Lordships to decide in this case whether the answer of the Full Bench, limited as it must have been to the case of a stranger to the watan, setting up, as a defence, twelve years' adverse possession, was or was not correct, although they are constrained to say that it is somewhat difficult to see how a stranger to a watan can acquire a title, by adverse possession for twelve years, to lands, the alienation of which was, in the interests of the State, prohibited...In the present case the defence of twelve years adverse possession as permanent tenants is set up by persons who, and their predecessors-in-title, always claimed to be and were tenants of service watan lands, and in the opinion of their Lordships neither the defendants nor their predecessors-in-title could have acquired any title to a permanent tenancy in the lands by adverse possession as against the watandars from whom they held the lands."

If then a person who is in possession of the watan lands as a tenant of the watandar cannot acquire title to a per-

manent tenancy, that is to say, fixity of tenure, it is difficult to see how such a tenant can acquire a right by adverse possession to fixity of rent. It may be that, as was held in *Gopalrao v. Mahadevrao*, (2) a tenant can acquire a right of fixity of rent as against the immediate holder of the watan, but that would not prevail against the next holder, and in this case the suit having been filed within twelve years of the plaintiff succeeding to the watan, it is not barred. Therefore, following the decision of the Privy Council, we hold that the right of the plaintiff to enhance the rent exists.

There was another question which arose in this case and it was this. There was no permanent tenancy until the Court declared that the presumption under S. 83 of the Bombay Land Revenue Code arose. Until that was decided the defendants were only annual tenants not even having fixity of tenure, and consequently the plaintiff's right to enhance the rent which was recognised by S. 83 could not have been denied as against the watandars.

On both these grounds it seems to me that the decision of the trial Court was right. The appeal should be allowed and the decree of the trial Court restored with costs throughout.

Crump, J.—In my opinion it is impossible to apply to this case the principles laid down by the Full Bench in *Radhabai v. Anantrav Bhagvant Deshpande* (1) for that case has been distinguished by the Privy Council in *Madhavrao Vaman Saundalgekar v. Raghunath Venkatesh Deshpande* (3). The facts of that latter case were so similar to the facts now before us that it is binding upon us as an authority for the proposition that a permanent tenancy cannot be acquired by a tenant of watan property as against the holder of the watan, and that authority is therefore sufficient for the decision of the case before us. Whether in other circumstances *Radhabai v. Anantrav* can still be regarded as an authority is a question which may have to be considered when those circumstances are before us. It seems to me, therefore, clear that the defendants in the present case cannot assert that they have by twelve years' adverse possession acquired a right to hold the property at a fixed rent. I should like further to point out that there is an error in the judgment of the Dis-

(3) 1923 P. C. 205=47 Bom. 595=50 I. A. 255=25 Bom. L. R. 1005=33 M.L.T. 389=(1923) M. W. N. 689=28 C. W. N. 857=47 M. L. J. 248 (P. C.)

strict Judge as to the date on which the suit was filed. The correct date is October 29, 1919, and not October 29, 1921, and therefore the suit was within twelve years from the death of the last holder.

Appeal allowed.

★ 1925 BOMBAY 377.

MACLEOD, C. J. AND COYAJEE, J.

Tukaram Dhondi Takamare — Defendant—Appellant.

v.

Balabai Naigu Takamare — Plaintiff—Respondent.

Second Appeal No. 814 of 1923, Decided on 14th January 1925, from the decision of the Dt. J., Belgaum, in Appeal No. 180 of 1922.

★ *Possession* — Suit based on — *Prima facie* title proved—Better title must be proved by defendant.

Where a person in possession sues for injunction to prevent defendant from disturbing his possession and proves *prima facie* title, the defendant, in order to resist plaintiff's claim successfully must prove superior title in him. 25 Bom. 287 Foll. [P. 317, C. 2; P. 378, C. 1]

Nilkant Atmraram—for Appellant.

A. G. Desai—for Respondent.

Judgment.—The plaintiffs sued for an injunction against defendants restraining them from obstructing the plaintiffs or their men in the enjoyment of the plaintiff land. It was alleged that the plaintiff land belonged to plaintiff No. 1, and was in her *vahivat*; that her husband held and enjoyed the land as remuneration for his services as Sanadi; that defendant No. 1 had no right to it; that the services were recently stopped and the land shown in attached Sanadi land; that the Khata was changed to the name of plaintiff No. 1; and that full assessment was collected from her.

Defendants Nos. 1 and 2 by their written statement contended that the plaintiff land was assigned for Sanadi services and was in the possession of defendant No. 1; that defendant No. 1 had worked therein; that the plaintiffs were not in possession of it; that the land was the ancestral land of the family; that Lingoo and his brothers, Sakham and defendant No. 1 divided the land; that Lingoo was being paid Rs. 20 for his services as Sanadi by

his brothers; that on his death in 1907 defendant No. 1's son Kallappa was appointed a Sanadi by Government and was given the whole land for his remuneration by Government; that Kallappa got no money for his remuneration; that the services were stopped in 1911; that full assessment was being collected from Kallappa after the land was attached; that Kallappa performed the services whenever necessary till his death in 1914; that since then defendant No. 1 performed the services whenever necessary; that as the land was Sanadi whoever performed the services was the owner of the land; that the land became Kallappa's as the services were stopped when he was performing them; that thereafter defendant No. 1 was the owner as he performed the services; that after Sakham and Lingoo died in 1907, Sakham's son, Rama, and Lingoo's widow Balabai (plaintiff) began to reside in the defendant No. 1's house; that plaintiff began to manage the affairs of the family and took care of Rama; and that as she was the elderly person in the family and was managing the affairs defendant No. 1 consented to the change of Khata to her name.

The first issue was: "Does plaintiff prove that she has possession of the suit land?" That was found in the affirmative. It is unfortunate that a further issue was not raised, whether defendants proved that they had title to the land, because it would be open to the defendants in a suit of this character to resist an injunction being passed against them if they could show that the plaintiff in possession asking for an injunction had no title.

In *Hanmantav v. Secretary of State for India* (1) it was held that the plaintiff being in possession (not shown to have wrongfully originated), such possession was good against the whole world except the person who could show better title, and that the burden of proving such title lay on the defendant. Mr. Justice Ranade said:—

"When a person in possession of land has been dispossessed and sues to recover it, the fact of his previous possession will not entitle him to a decree unless he sues under S. 9 of the Specific Relief Act..... within six months of the date of dispossession. If he sues after the six months have expired, he must prove *prima facie*

(1) [1900] 25 Bom. 287=2 Bom. L.R. 1111.

title. In such a case he is entitled to a decree unless a superior title is proved on the other side."

In this case the plaintiff is not suing for possession after dispossession, but she has proved a *prima facie* title coupled with possession. Therefore she is entitled to be protected against disturbance by an outsider unless such outsider proves that he has a better title than the plaintiff. If this decree were to stand the defendants would be debarred from proving that they had a good title against the plaintiff to the land in dispute. We do not think that is consonant with justice. Consequently we must set aside the decree and remand the case to the lower Court, so that the defendants may have an opportunity of proving that they have a superior title to the land in suit. As however they are responsible for this issue not having been raised in the trial Court, the appellants must pay the costs of the suit in this Court and in the Court below. Costs in the trial Court will be costs in the cause. Liberty to both parties to adduce additional evidence on that issue.

Case remanded.

1925 BOMBAY 378

MACLEOD, C. J. AND COYAJEE, J.

R. K. Mody & Co.—Defendants—Appellants.

v.

Mahomedbhai Abdool Hussein & Co.—Plaintiffs—Respondents.

O. C. J. Appeal No. 121 of 1924 and Suit No. 2244 of 1923, Decided on 18th March, 1925.

Bombay Rent (War Restrictions) Act (II of 1918) S. 10 A—Defendant applying for restoration and becoming successful on merits—Act expiring in the meantime before order was passed in his favour—Proceedings ipso facto terminate and defendant cannot succeed.

Plaintiffs filed a suit on June 14th, 1923 to evict defendants on the ground that they had given them notice to quit as the plaintiffs wanted the premises for their own use and requirements. On the faith of this requisition the defendants agreed to vacate under a consent decree passed on August 24th 1923, by which they agreed to give possession by January 31st, 1924. On August 20th, 1924, defendants took out a notice of motion asking the Court to pass an order not only for the restoration of the premises to the defendants, but also for damages on the

ground that the requisition on which they were evicted was *mala fide*. It was found that the requisition on which the plaint proceeded was a false requisition, and the occupation of the plaintiffs was a pretence. It was not, therefore, *bona fide* and in the ordinary circumstances the defendants would have been entitled on the notice of motion to an order for restoration, and also for an order for payment of compensation. The Bombay Rent (War Restrictions) Act (No. II of 1918) with reference to business premises however expired before any order was actually passed.

Held: that the defendants' right to apply to the Court for restoration, and for payment of compensation did not survive the expiration of the Act. [P. 380, C. 1]

If proceedings taken under a temporary statute are not terminated before the period of statute expires, then on the expiration of the statute the proceedings *ipso facto* are determined. [P. 319, C. 2]

B. J. Desai—for Appellants.

Kanga with Khan—for Respondents.

Macleod, C. J.—Plaintiffs filed Suit No. 2244 of 1923 on June 14, 1923, to evict two defendants from the two shops in Nagdevi Street on the ground that they had given them notice to quit as the plaintiffs wanted the premises for their own use and requirements. On the faith of this requisition the defendants agreed to vacate under a consent decree passed on August 24, 1923, by which they agreed to give possession by January 31, 1924.

On August 20, 1924, defendants took out a notice of motion asking the Court to pass an order not only for the restoration of the premises to the defendants on the ground that the plaintiffs' requisition had not been fulfilled, but also for damages on the ground that the requisition on which they were evicted was *mala fide*.

The learned Judge found that the requisition on which the plaint proceeded was a false requisition, and the occupation of the plaintiffs was a pretence. It was not, therefore, *bona fide* and in the ordinary circumstances the defendants would have been entitled on the notice of motion to an order for restoration, and also for an order for payment of such compensation as the Court might think fit. But unfortunately for the defendants the Bombay Rent (War Restrictions) Act (No. II of 1918) with reference to business premises expired on August 31, 1924, and no order on the motion had been made before that date.

The question would arise then, whether the defendants' right to apply to the Court for restoration, and for payment of com-

compensation would survive the expiration of the Act. That must depend, as the Act was a temporary one upon the construction of the Act itself, because S. 7 of the Bombay General Clauses Act will not apply to temporary statutes. The proviso to the first section of the Rent Act is as follows:—

“Provided that the expiration of this Act shall not render recoverable any rent which during the continuance thereof was irrecoverable or affect the right of a tenant to recover any sum which during the continuance thereof was under this Act recoverable by him.”

That proviso originally was clearly intended to apply to the provisions of Ss. 3 and 12. The learned Judge remarks:—

“The proviso, therefore, refers to two cases: (1) proceedings taken by a landlord and (2) proceedings taken by a tenant. The reference to proceedings taken by a landlord is evidently to S. 3 of the Act, and the restriction on the recovery of rent in excess of the standard rent is continued after the expiration of the Act in respect of rent accruing during the continuance of the Act. Then with reference to the proceedings taken by a tenant, the reference is evidently to S. 12 of the Act, which enacts that where a tenant has paid any sum on account of rent in excess of what is recoverable in case of standard rent he has a right to recover that sum from his landlord.”

It has been argued that that proviso would also include the right of a tenant to ask the Court for payment of compensation under the provisions of S. 10A. Now S. 10A was inserted by Bombay Act XIV of 1920, S. 2 and it was argued by the respondents in support of the judgment, that if it had been intended to reserve the rights of the tenant to ask the Court for payment of compensation under S. 10A after the expiration of the Act, the proviso to S. 1 would have been amended. It seems most probable that the question whether the rights of a tenant under S. 10A survived the expiration of the Act was not considered by the legislature.

But even if that question was not considered, the defendants might still succeed if they could bring themselves within the proviso to S. 1. Before I deal with that question, I will deal with the question whether when proceedings have commenced before the expiration of the Act, they can be competent after the expiration of

the Act in spite of their not coming within any proviso reserving the rights of a tenant to continue proceedings then pending. Reference has been made to a passage in Halsbury's Laws of England, Vol. XXVII, p. 158, para 501, where it is stated that if proceedings taken under a temporary statute are not terminated before the period of the statute expires, then on the expiration of the statute the proceedings *ipso facto* are determined. Various authorities are quoted for that proposition, the earliest being *Miller's case* (1), and no case has been cited to us in which civil proceedings of this nature, which only arise by virtue of a temporary statute, have been held competent to be continued after the expiration of the statute.

The fact, therefore, that these proceedings were commenced on August 20, 1924, before the expiration of the statute, will not by itself avail the defendants. They must come, if at all, within the proviso. It has been contended that as this is a suit for an unliquidated sum to be ascertained as compensation for the plaintiffs' want of *bona fides*, it cannot, in any event, come within the proviso, which only applies to any sum recoverable by the tenants under the Act during the continuance thereof. I doubt very much whether it can be said that an action by a tenant to recover rent, which should not have been paid under the provisions of S. 12, would be a suit for an ascertained sum, because although he might mention the amount of the claim in suit, the actual amount due could only be ascertained by means of an inquiry. However I quite agree that such an action would be of a different character from an action for unliquidated damages and I think the answer to the appellants' case lies in the fact that proceedings which it is permissible for a tenant to take under S. 10A are not primarily proceedings to recover either an ascertained sum or liquidated damages. They must be instituted in the first instance for the purposes of getting an order for restoration from the Court, and it is only when the Court is of opinion not only that the defendant in the circumstances of the case is entitled to restoration, but also that the plaintiff has not acted *bona fide*, that the Court can direct payment of compensation to be made to the tenant by the landlord. If

(1) [1764] 1 Wm. Bl. 451.

the appellants' contention were correct, then even after the expiration of the Act, the defendants on proving want of *bona fides* on behalf of the landlord in turning them out, would be entitled to ask the Court to grant them compensation, although there would be no jurisdiction in the Court to restore the defendants to the premises. But it is perfectly clear that no right is given to the tenant to apply to the Court for compensation only, irrespective of whether he can get restoration or not.

We think, therefore, this particular question was not in the mind of the legislature when S. 10A was inserted in the original Act, and that the rights of a tenant to recover compensation under the section after the expiration of the Act were not reserved. The appeal, therefore, will be dismissed with costs.

Coyajee, J.—I agree.

Appeal dismissed.

★ 1925 BOMBAY 380

MARTEN AND FAWCETT, JJ.

Ratilal Nathalal—Appellant.

v.

Motilal Sankalchand—Respondent.

S. A. No. 353 of 1923, Decided on 26th September 1924, from the decision of Asst. J., at Ahmedabad, in Appeal No. 169 of 1920.

(a) *Hindu Law—Custom—Kadwa Kunbis—Property inherited by a childless woman from her father—After her death property devolves on her father's relations and not on her husband.*

Among the Kadwa Kunbis of Ahmedabad there is a custom, according to which the property inherited by a married but childless woman from her father passes on her death to her father's relatives in preference to her husband or his relatives.

★ (b) *Custom—Proof—Three instances 25 years old were held sufficient to prove that custom was ancient.*

A custom was held valid and ancient though only seven main instances in support of it were held proved, three out of which were about 25 years old, and the remaining four were only of two to nine years before the suit was brought. The Court has not only to consider in such cases only the number of instances but also the likelihood of there being any large number of instances. [P 384 C 1]

★ (c) *Civil P. C., S. 100—Whether a specific instance as to custom is proved is a question of fact—Objection as to general insufficiency of evidence may be gone into in second appeal.*

Objections based on the grounds of insufficient evidence, or improper rejection of evidence, or as to the evidence taken as a whole amounting to insufficient proof in law of local custom, may be gone into in second appeal, but whether a specified instance is properly proved or not, is a question of fact. [P 332 C 1]

M. P. Amin and M. H. Mehta—for Appellant.

G. N. Thakor and H. V. Divatia—for Respondent.

Marten, J.—The question in dispute in this second appeal is one of the right of succession to the estate of a Hindu child widow who died at the age of nine years on July 9, 1903, and without issue. She belonged to the Kadwa Kunbi caste and had been married as a child to the plaintiff in the suit. Her father predeceased her leaving no male issue, and consequently she succeeded to his property.

But a question that has arisen on her death is, does this property go to the plaintiff as the heir of his deceased wife Kamla, or does the property pass to her own blood relations on her father's side? It is common ground that under ordinary Hindu law the plaintiff would take as her husband, but a special custom is set up by the defendant who claims to be her heir on her father's side, that in this particular caste where a married woman dies under such circumstances without issue, the property reverts to her father's family and does not pass to her husband. The onus of proving such a custom, being as it is a departure from the ordinary Hindu law which would otherwise govern the parties, rests clearly on the person who alleges it, viz., the defendant. Moreover, it is equally well-established that in order to prove such a custom, it must be shown to be ancient and invariable, and also be such that there is nothing unreasonable or contrary to public policy in the Court giving effect to it.

Both the Judges in the lower Courts were members of the Hindu community, and in the trial Court the learned Extra Joint Subordinate Judge dealt at great length and with great care with the voluminous evidence that was brought before him. I appreciate to the full the following observation he has made, viz., "The evidence is voluminous and rather likely to hypnotise and be tedious and monotonous, as

it involves a detailed investigation of the devolution of property in this community which is by no means an insignificant proportion in this province. There is considerable risk of confusion." I also in similar cases of custom have felt as a trial Judge the difficulty of giving to others a clear analysis of the evidence put before the Court. But the judgment of the learned trial Judge appears to me to be particularly lucid in this case. He has given us summaries of the various instances. He has given us certain cross references to show from which particular town or district the various witnesses come. He has also divided up the evidence into two main portions, viz., one summary which relates to property which the girl inherited from her father, and another summary which related to cases where the girl was given presents of ornaments and clothes by her father or relations in her lifetime and where those ornaments and clothes or some portion of them went on her death not to her husband, but to her father or her relations in her father's family.

Then the learned Judge has also analysed the evidence in another way. There was also a large body of general evidence adduced by leading citizens in this particular caste whom the learned Judge particularises and shows to be men whose respectability and reliability cannot be impeached. The witnesses are very numerous and amongst them was one of the learned Judge's own Subordinate Judge. But the trial Judge has recognised that merely a general statement by members of the caste, unaccompanied by positive instances in which the alleged custom was actually exercised, would be by itself insufficient. Accordingly he has dealt with the instances in the two main decisions I have mentioned, viz., the one where the girl inherited property from her father, and the other where the property merely consisted of ornaments and clothes which had been given to her by her father or relations.

The former class is naturally much more important, because after all as regards ornaments and clothes, particularly in the case of one who dies as a mere child, it may very well be that the child husband, or the adult husband would not necessarily claim those articles, but might allow the girl's relatives to retain them. But as regards the succession

to the property itself, that stands on a different footing. The learned Judge very rightly attaches more importance to that body of evidence than to the corresponding evidence about the ornaments.

As regards the instances under the first branch, the learned Judge found that some seven in all were proved to his satisfaction out of some thirty or forty which were placed before him. Before us, counsel for the appellant has based his main contention on this, that seven instances are not enough to prove a custom, and, secondly, that the instances given are of too recent a date to justify the Court in arriving at the conclusion that the custom is an ancient one. That of those seven some four were only two to nine years before the date when the suit was brought in 1916, and that only the remaining three are about twenty-five years old. In support of that proposition *Bhagvandas Tejmal v. Rajmal* (1) was relied on. That was a case of adoption amongst Jains and as to whether a certain custom was or was not proved. The Court, after pointing out that there were no men of learning and no books of the sect in support of the alleged custom, proceeded as follows: "There are, in the whole body of evidence to which our attention has been directed, only four specified instances of such adoption, and of these the most ancient is one which occurred about twenty-two years ago, and one of the four breaks down, inasmuch as the widow of the adoptive father was living when the adoption is alleged to have taken place." That was a case that related to the adoption of an orphan.

It is accordingly said that there are only seven cases here, and therefore on the authority of *Bhagvandas Tejmal v. Rajmal* (1) the present evidence is insufficient. But it must be borne in mind that in addition to what I will call the general body of evidence in this case there was a large amount of evidence on the second-branch of the case, and a large number of instances there were given with reference to the ornaments and clothes. Therefore, quite apart from the fact that the number of instances here were nearly double those in the case cited, we have other instances as regards ornaments and clothes.

[His Lordship held that the evidence was sufficient as the nature of the

(1) [1873] 10 B. H. C. R. 241, 262-4.

case could not permit there being many instances, and 7 instances clearly proved together with other instances as regards ornaments and cloths would be sufficient.]

I should explain that we have not thought it necessary to call upon counsel for the defendant in the present case. It may be that if we had, he would have been able to urge upon us that in law some instances which were rejected by the lower Court ought to have been really accepted. But as to that I feel strongly the limitations under which we must hear this case in the appellate Court. Objections based on the ground of insufficient evidence, or improper rejection of evidence, or as to the evidence taken as a whole amounting to insufficient proof in law of local custom, we may properly go into. But whether a specified instance is properly proved or not, that I take it is a question of fact, the decision of which properly lies with the lower appellate Court and which at any rate under the normal circumstances governing our work here we should not inquire into but accept as accurate. And in a case with great mass of detail like the present, it is plain that if once the Court began investigating the detailed evidence as regards one particular instance, it would be difficult to resist applications to go into evidence in other instances.

The practice in this respect has recently been considered in *Parshotam v. Venichand* (2)—another case of an adoption amongst Jains. There the Court dealt with the description of evidence which might fairly be accepted in cases of this nature. The Chief Justice said (p. 232):—

"If, then, the evidence shows that for a certain number of years, and some cases appear to lay down as a useful guide a period of twenty years, there have been a number of instances in which the alleged custom has been recognized, the presumption arises that the parties concerned have acted in that manner, not from a desire to set up a new custom, but because they are acting in accordance with the tradition of immemorial usage."

Then at p. 235 Mr. Justice Fawcett said:—

"In the case before us the two lower Courts have held the alleged custom permitting the adoption of orphans to be established as a valid one. The main ques-

tion is whether there is sufficient ground for our interfering with this finding in second appeal. The Privy Council have more than once held that, whether a custom is proved, is mainly a question of fact... Accordingly in *Kailash Chandra Datta v. Padmakishore Roy* (3) it was held on a review of all the authorities, that the question whether the facts found in any given instance prove the existence of the essential attributes of the custom or usage is a question of law which might be discussed in second appeal, while the question whether such a state of facts has been proved by the evidence is merely a question of fact."

I respectfully adopt what the learned Judge states there. He then proceeds to deal with the sort of evidence that one might fairly require, and how far back one might reasonably expect it to go. He states at p. 236:—

"Similarly in the cases of *Manohar Lal v. Banarsi Das* (4) and *Asharfi Kunwar v. Rup Chand* (5), where the custom of adoption of a married man was held established, the instances adduced do not appear from the judgment to have gone back beyond some thirty to thirty-five years. In *Chiman Lal v. Hari Chand* (6) where the adoption of the plaintiff who was an orphan and married was held valid, the evidence is stated in their Lordships' judgment to be 'somewhat limited.' Halsbury's Laws of England, Vol. X, Article 442, at p. 234 says that as a general rule proof of the existence of the custom, as far back as living witnesses can remember, is treated, in the absence of any sufficient rebutting evidence, as proving the existence of the custom from time immemorial, and that evidence of the existence of the alleged custom for a period of twenty years may be sufficient to warrant a Court in finding as a fact the existence of the custom from time immemorial. A similar rule was applied to Hindu usages by Gray, C. J. in a judgment delivered so long ago as 1831."

(3) [1917] 45 Cal. 235=25 C.L.J. 613=41 I. C. 959=31 C.W.N. 972.

(4) [1907] 20 All. 495=4 A.L.J. 407=(1907) A. W. N. 121.

(5) [1908] 20 All. 107=5 A.L.J. 230=(1908) A. W. N. 73.

(6) [1913] 40 Cal. 87=40 I. A. 157=102 P. R. 1913=17 C. W. N. 885=126 P. W. R. 1913=167 P. L. R. 1913=(1913) M. W. N. 509=13 C.L.J. 70=15 Bom. L. R. 616=19 I. C. 660=14 M.L.T. 83 (P. C.)

(2) [1921] 45 Bom. 754=31 I. C. 492=23 Bom. L. R. 227.

Then as regards the proper course to take in second appeals, I may refer to *Bai Shirinbai v. Kharshedji*, (7) which was a case of an alleged child marriage amongst Parsis. There Sir Charles Farran says at p. 437:—

"The difficulty in this case is to ascertain what the Parsi law on the subject of infant marriage is...In the present case however, we are met by the finding of the lower Courts that there has grown up in India a custom amongst Parsis which validates and renders binding marriages between Parsis though contracted between children of tender age, and that custom was in full force as a custom in 1869. Sitting as we are in second appeal we feel that it is not open to us to arrive at an independent finding as to whether the evidence establishes the existence of such a custom as there is indisputably a large body of evidence upon the record in support of it."

I think the judgment which I have just cited shows what our proper course is, viz., that generally speaking we should not investigate the details of the evidence in support of the various instances, but should merely consider whether taken as a whole it is sufficient in law to support the custom alleged. That indeed is the course which counsel for the appellant quite properly has adopted before us. Some application was I think made to us to go into the details of evidence but we did not see our way to comply with that request, even as regards instances which the lower appellate Court held to be proved.

Then as regards the question of the number of instances, I have already dealt with one answer that could be made to *Bhagvandas Tejmal v. Rajmal* (1) on the present materials. As regards the antiquity of the various instances, similar observations to some degree apply. We have at any rate three instances going back over twenty-five years. In this respect I may refer to the *Halai Memon case* (*Khatuboi v. Mahomed Haji Abu* (8)) which involved a question whether the Halai Mamons of Porebunder who were Mahomedan converts had retained on their conversion the Hindu customs of succession, as is the case with Khojas and Cutchi Memons, or whether, as was undoubtedly the case with the Halai

Memons of Bombay, they had acquired same rights of succession as ordinary Mahomedans. The exact point there turned on whether daughters were entitled to succeed along with their brothers, as is the case under the Koran, or whether as under Hindu law the daughters took no aliquot share but were only entitled to marriage expenses if still unmarried.

As far as Bombay Halai Memons were concerned, there was documentary evidence in the Probate and other records of this Court going back over hundred years to show that invariably in this city a Halai Memon's succession was an ordinary Mahomedan succession. But there was no documentary evidence like that as regards the Porebunder Memons, who were the subject of the suit. As regards the latter the number of instances held proved by the trial Court were I think some sixteen or so out of the fifty tendered in support of a Hindu succession. In the appellate Court it was held that the number should be increased from sixteen to twenty-five. But trial Court was pressed, as we have been pressed here, with the argument that the instances were not of sufficient antiquity to justify proof of the custom, and the trial Judge states in *Khatubai v. Mohammad Haji Abu* (8) at p. 310 "I have the following general criticisms to pass on the thirty-seven instances relied on by Mr. Setalval. In the first place, they are all recent or comparatively recent. Only four of them, viz., Nos. 25, 26, 36 and 39 are shown to be instances of deaths prior to 1900." The date of the trial was 1917, and the evidence was almost entirely commission evidence, and thus there were only four instances shown older than, say, some seventeen years before the trial of the suit.

Moreover, the community there was a large one, and inasmuch as it was a question of the succession of daughters along with sons, it was a class of cases that must occur with great frequency, viz., in every one of the normal cases where a father leaves both sons and daughters. It was, therefore, a very different class of case from the present case, where the instances can at best be only occasional. In the *Halai Memon case*, I confess I was influenced by the argument as to want of antiquity taken with other circumstances, in coming to the conclusion that the custom had not been made out. But that decision was

(7) [1896] 22 Bom. 430.

(8) [1917] 20 Bom. L. R. 289=45 I. C. 6,9.

erroneous, for it was differed from in the appellate Court and the decision of the appellate Court was afterwards confirmed by their lordships of the Privy Council.

So the argument that has been addressed to us by the appellant does not carry with it anything like the same force as it would do if it had come to me as a new point free from any past experience of my own. In my judgment if the High Court considered that merely four instances older than seventeen years were sufficient in the *Halai Memon* case, then the present three instances are amply sufficient in the present case.

Accordingly, in the view I take, the main arguments that have been presented to us by the appellant that the instances were insufficient and that they were not of sufficient antiquity, fall to the ground. Speaking generally, the litigants here have had the advantage of two careful judgments from learned Hindu Judges, who are particularly acquainted with matters affecting the Hindu community. Having read those judgments, I see no reason whatever to arrive at a different conclusion in second appeal from that which the lower appellate Court has arrived at.

I will only add in conclusion that, quite apart from the custom as to succession which I have dealt with, there was a totally different custom set up in the trial Court, *viz.* that the marriage of a child wife was not completed and was not legal until a certain ceremony called *Chuda Vidhi* had taken place. That custom was advanced by the defendant and if proved would have negatived the right of the plaintiff, for in that case the marriage would not have been validly completed. The learned trial Judge found that the custom was not proved, and there is no appeal to us as regards that finding. I may express a hope that if this case is reported on the question of the custom of this particular caste, it will not be overlooked that there is a careful and interesting judgment from the trial Judge on this alleged custom of *Chuda Vidhi*. In the course of that, he discusses not only the alleged custom but enters at length into the details of the ceremonies of marriage in that caste and to some extent amongst Hindus generally. That particular judgment does not concern me as a judge in the present case, but as an individual, I have read it and read it

with interest, and I hope others who take an interest in these points which are of so great importance to the large communities in this land, and which ought to be definitely and clearly settled, will also read it.

In the result, I would dismiss this appeal with costs.

Fawcett, J.—I concur in dismissing the appeal with costs. The learned Judges in the two lower Courts have obviously borne in mind the recognised canons that govern the proof of a special custom, such as that set up in this case, and no error of law has in my opinion been established which would justify our interference in second appeal.

I endorse the remarks of my learned brother as regards the great care which the learned trial Judge has shown in dealing with the voluminous evidence, and it is apparent that he has adopted a proper standard of proof in regard to the instances adduced in support of the alleged custom. It does not necessarily follow that many of these instances, which he holds not satisfactorily proved, have not really occurred; and the mere fact that only seven have survived the tests that he submitted them to, does not involve the necessary consequence that there are only a few instances of the kind alleged which have really happened.

As regards the point that none of these instances go beyond some thirty or forty years, I agree with what my learned brother has said, and think that, in the circumstances which he has referred to, it is unlikely that documentary or other evidence of more ancient instances should be available in cases of this kind. I think the instances show sufficient ground for presuming that this is not a mere custom or practice of recent date, but that it has thus come down from ancient times. It also is a custom that obviously has a large amount of reason to support it. I think that the finding of the lower appellate Court on this question of custom is one that must be accepted by us in second appeal, and that there is no legal ground for our refusing to do so.

Appeal dismissed.

1925 BOMBAY 385

MACLEOD, C. J. AND COYAJEE, J.

Bai Lalbu—Appellant.

v.

Mohanlal Gokaldas Javeri—Respondent.

First Appeal No. 77 of 1924, Decided on 5th March 1925, against the decision of the Sub. J., Ahmedabad, in Dharkast No. 357 of 1923.

Civil P. C., S. 47—Decree for specific performance of contract for sale—Question of Judgment-debtor damaging property after decree can be gone into by executing Court.

The question with regard to waste committed by a judgment-debtor after the date of the decree is a question arising between the parties relating to the execution, discharge or satisfaction of the decree, and must be determined by the Court executing the decree and not by a separate suit. Hence where a decree has been passed for specific performance of a contract for the sale of immovable property, and where it is alleged that subsequent to the decree, the judgment-debtor has damaged the property with a view to cause loss to the decree-holder, the question can be gone into by the executing Court. 1923 Bom. 391 *Foll.* [P 385, C 2]

G. N. Thakor and R. J. Thakor—for Appellant.

Ratanlal Ranchhodas—for Respondent.

Macleod, C. J.—In this suit a decree for specific performance was passed against the defendant on February 26, 1923. The plaintiff did not take the necessary steps to produce the purchase money, so the defendant took out a *darkhast* on June 21 of 1923, for payment of the purchase money in order that the matter might be completed. The plaintiff then complained that the defendant had pulled down some of the bricks out of the property in dispute with a view to causing damage to him. A commissioner was appointed, and he made a report showing the present condition of the building on November 17, 1923. The commissioner could not decide whether the defendant had caused wilful damage to the building since the date of the decree. On the report the First Class Subordinate Judge made an order that time should be given to the defendant to replace the property in the suit in the same condition as it was at the date of the suit. That being done, the plaintiff should lodge the money in Court, and the defendant should give over possession

of the property to the plaintiff. No reason is given for this order. The direction that the defendant should replace the property in suit in the same condition as it was at the date of the suit, was clearly wrong. The issue between the parties was whether the defendant, between the date of the decree and the date of the *darkhast*, i. e., June 21, 1923, had caused wilful damage to the property, so that on its being delivered to the plaintiff in pursuance of the decree the value would have been reduced. It is contended that that is not a question which arises in execution, and that the plaintiff will have to file a suit to have it decided. In *Hari v. Sakharam* (1), it was decided by this Court that the question with regard to the waste committed by a judgment-debtor after the date of the decree is a question arising between the parties relating to the execution, discharge or satisfaction of the decree and must be determined by the Court executing the decree, and not by a separate suit. In that case it was alleged that after the decree and while the appeal was pending the defendants committed waste by cutting down trees. There does not appear to be much difference between a case where an appeal has been filed, and the party remaining in possession commits waste, and a case where possession is directed to be given by a decree, and before possession is given waste is committed. The question is really whether a successful party can be said to get possession of what was directed to be given to him by the decree, if the party in possession deliberately has caused damage to the property. There is no reason why the question of damage should not be tried in execution.

We think then that the appeal must be allowed and the *darkhast* sent back to the lower Court to decide this issue "whether between the date of the decree and the date of the *darkhast*, i. e., June 21, 1923, the defendant caused wilful damage to the suit property." If that issue is found in the affirmative, then the next issue will be, "what was the extent of damage." The Court, if it finds that there has been wilful damage caused to the property by the defendant, will be entitled to direct payment of that damage out of the purchase money due by the plaintiffs. This order should not delay

(1) 1923 Bom. 391=25 Bom. L. R. 419.

the prosecution of the darkhast with regard to the payment of the purchase price and delivery of possession. We leave it to the Judge to decide whether it will be necessary to take security from the defendant if the purchase price is paid into Court, for any damage that may be found to have been caused between the date of the decree and the date of the darkhast, i. e., June 21, 1923. The appellant must get her costs in this Court. Costs in the lower Court will be costs in the darkhast.

Appeal allowed.

1925 BOMBAY 386

MACLEOD, C. J. AND COYAJEE, J.

Devakaran Bholaram and others—Appellants.

v.

Sangidas Jesiram and others—Respondents.

O. C. J. Appeal No. 36 of 1925 and Suit No. 351 of 1923, Decided on 6th April 1925.

(a) *Civil P. C., O. 12 R. 1—Affidavit of documents—Order as to, obtained against defendant—Defendant dying—Representatives brought on record—Fresh order as to affidavit must be obtained against representatives.*

Where an order as to affidavit of documents is obtained against defendant but the defendant dies and his representatives are brought on record, a fresh order as to affidavit must be obtained against them. [P 386, C 2]

(b) *Civil P. C., O. 11, R. 21—Defendant disobeying Court's order—Defendant should be allowed opportunity to show cause—Defence should be struck out if defendant is guilty of wilful neglect.*

A defendant is liable to have his defence struck out only when an order of the Court has not been obeyed, and even then the Court should direct that the defendant be called upon to show cause why his defence should not be struck out. The penalty will be imposed, if it can be shown that the non-compliance with the order of the Court is due to wilful default. [P 387, C 1]

Chimanlal Setalvad—for Appellants.

B. G. Desai and Thomas Strangman—for Respondents.

Macleod, C. J.—This is an appeal against the order of Mr. Justice Taraporewala striking out the defence of defendants Nos. 2 and 2A in an interpleader suit filed by P. Crystal & Co. in January 1923. The original dispute with regard to the money paid into Court by the plaintiffs was between the second defendant Devaka-

ran Bholaram and the third defendants Messrs. Tullockchand and Shapurji a firm. The fourth defendant was afterwards added by the order of February 14, 1923. No order was made discharging plaintiffs and giving directions with regard to the procedure to be adopted for determining the questions in issue between the defendants. There seems to have been considerable delay in filing the written statements, and thereafter an order for affidavit of documents was obtained by the attorneys for the first, third and fourth defendants against the original second defendant on March 7, 1924. The original second defendant died on June 18, 1924, without having filed his affidavit of documents, and the present defendants Nos. 2 and 2A were brought on the record in his place on September 4, 1924. The proper course for the third and fourth defendants' attorneys then to pursue was to get an order against the newly substituted defendants for an affidavit of documents, and their failure to do that has vitiated the subsequent proceedings. Instead of getting that order they wrote calling upon these defendants to file their affidavit of documents. The attorneys of these defendants on December 16, 1924, promised to furnish a copy of their clients' affidavit in the course of a week. But as the affidavit was not forthcoming, thereafter Messrs. Bhaishankar Kanga and Giridharlal naturally became impatient, so they took out a chamber summons applying for an order that defendants Nos. 2 and 2A should file their affidavit of documents and that in default of their doing so their defence should be struck out and the suit set down for an *ex parte* decree. In his affidavit in support of the summons (paragraph 9) the fourth defendant says:—

"The fourth defendant's attorneys repeatedly called upon the defendants Nos. 2 and 2A to file their affidavit of documents and to furnish a copy thereof but they have failed to file the same up to now. Under the aforesaid circumstances, I pray that the appearance filed on behalf of defendants 2 and 2A and their defence may be struck off and they be placed in the same position as if they had not appeared and defended this suit."

If defendants Nos. 2 and 2A had already disobeyed an order of the Court, then that was the right procedure to follow. But as defendants Nos. 2 and 2A had

merely failed to fulfil the promise made in correspondence, and there was no order of the Court which they had disobeyed, that procedure was wrong. When the summons came before the Judge he made an order that defendants Nos. 2 and 2A should file their affidavit of documents within three weeks from the date of the order, and that in default of their doing so their appearance and the defence if any should be struck off from the suit. Presumably that order was made under Order XI, rule 21, Civil Procedure Code. That rule says :—

“Where any party fails to comply with any order to answer interrogatories, or for discovery or inspection of documents, he shall, if a plaintiff, be liable to have his suit dismissed for want of prosecution, and if a defendant, to have his defence, if any, struck out, and to be placed in the same position as if he had not defended, and the party interrogating or seeking discovery or inspection may apply to the Court for an order to that effect, and an order may be made accordingly.”

On March 9, the attorneys of defendants Nos. 2 and 2A had sent an unaffirmed copy of their affidavit to the other side explaining that their *Mehta* was still absent up-country. On March 10, the case being on the board for an *ex parte* decree was adjourned until the 17th, defendants Nos. 2 and 2A being told to put in an affidavit explaining the delay. As the *Mehta* did not arrive the affidavit of documents was thereafter affirmed by these defendants. A defendant is liable to have his defence struck out only when an order of the Court has not been obeyed, and even then the Court should direct that the defendant be called upon to show cause why his defence should not be struck out. That penalty will only be imposed, as has been pointed out in numerous cases, if it can be shown that the non-compliance with the order of the Court is due to wilful default. So that the summons and the order made thereon being inherently defective, it must necessarily follow that the case should never have been set down for an *ex parte* decree, and the order made on March 18, 1924, cannot be supported. Even on the merits it is difficult to see how the order was justified. It is quite true that defendants Nos. 2 and 2A have been guilty of delay, but the excuse they gave was that their father having died they

were not acquainted with the subject-matter of the suit and that their *Mehta* was up-country, so that it seems to me that there was certainly some excuse for the delay. Although the affidavit eventually filed could have been filed very much earlier, even assuming that they had disobeyed an order of the Court, we cannot agree with the learned Judge that this was one of the grossest cases of disobedience of the order of the Court, so that these defendants should suffer the extreme penalty of having their defence struck out. We think then that the appeal must be allowed and the order striking out the defence must be set aside. The decree must also be set aside and the hearing of the suit proceeded with.

Defendants Nos. 2 and 2A to pay the costs of the day on March 18 of defendants Nos. 3 and 4.

Defendants Nos. 2 and 2A to get their costs of the appeal.

Coyajee, J.—I am of the same opinion.

Appeal allowed.

1925 BOMBAY 387

MACLEOD, C. J. AND COYAJEE, J.

P. B. Ponde and others—Applicants.

v.

Emperor—Opposite Party.

Criminal Revision Application No. 60 of 1925, Decided on 24th March 1925, against orders passed by the Chief Presidency Magistrate, Bombay.

City of Bombay Police Act, (Bom. Act IV of 1902), Ss. 70, 72 and 74—Accused though arrested under requisition from Magistrate are in police custody.

The mere fact, that the Chief Presidency Magistrate is furnished with certain information to enable him to make the requisition does not mark the completion of police investigation and the commencement of an inquiry or trial before him. Therefore accused are, when arrested, not in Magistrate's custody but are in police custody.

[P 389, C 1]

Thomas Strangman, P. B. Shingne and Velinkar—for Applicants.

Kanga and John Bowen—for the Crown.

Coyajee, J.—The petitioners in this case ask this Court to revise an order made by the Chief Presidency Magistrate on February 20, 1925, authorising their detention in the custody of the police till

March 6, and pray that it may "be ordered that the accused should not be kept in Police custody any longer but should be ordered to be kept in jail custody."

The material facts are these :—

On or about January 22, the petitioners were arrested in Indore for being concerned in offences punishable under Ss. 302, 307, 365, 120-B, 109 and 511 of the Indian Penal Code. The offences, it is alleged, were committed in the city of Bombay; and the petitioners were arrested in Indore by the Indore State Police at the instance of Inspector Smith of the Criminal Investigation Department, Bombay. On February 4, the Chief Presidency Magistrate, on the application of Inspector Smith, addressed a letter to the Agent to the Governor General in Central India asking him to make a demand to the *Darbar* for surrender of the petitioners. The requisition was complied with. They were brought to Bombay on February 7 and were immediately taken before the Chief Presidency Magistrate by the said officer. "Then," says the Magistrate, "an application was made to me by Mr. Smith under S. 70 of the City of Bombay Police Act for remand of the arrested persons. On the materials placed before me I was satisfied that there was a substantial ground for suspecting that the prisoners had committed an offence and their detention in the Police custody was really necessary for further investigation of the offences alleged. Further, when questioned, the accused had no objection to being remanded into police custody. Accordingly, I remanded them into Police custody till the 20th." Later, counsel on behalf of the petitioners applied to the Magistrate to re-consider that order on the ground that it was not competent to him to remand them into police custody. After hearing arguments, the Magistrate rejected the application; and on February 20 he made a further order which is now under consideration.

On the facts placed before us no question arises as to the legality of the arrests. No such contention was raised before the learned Magistrate, nor is it shown that the petitioners were arrested in Indore by the Bombay Police. But what is contended is this, *viz.*, the powers of the Bombay City Police as regards arrests of accused persons and investi-

gation into criminal cases are regulated by the City of Bombay Police Act, 1902; that Act does not empower a police officer to pursue a fugitive offender into any place outside British India; the petitioners were handed over to Inspector Smith at Indore in compliance with the requisition made by the Chief Presidency Magistrate; the petitioners when they were produced before that Magistrate were, therefore, in his custody and not in police custody; consequently, the Magistrate's order authorizing their detention in police custody was illegal.

We are unable to accept this contention. The proceedings are governed by the aforesaid Act. The pertinent Chapter is the 5th, and the material sections are Nos. 70, 72 and 74. S. 70 lays down that: "(1) Whenever (a) it appears that any investigation under this Act cannot be completed within the period of twenty-four hours.....and (b) there are grounds for believing that the accusation is well founded, the officer in charge of a section shall...forthwith forward the person accused to a Presidency Magistrate, together with a report setting forth the substance of the information received and of the evidence adducible in the case. (2) The Presidency Magistrate to whom an accused person is forwarded under sub-S. (1) may, after considering any information reduced into writing as hereinbefore provided, and examining any witnesses that he may consider necessary, from time to time authorise the detention, in such custody as he thinks fit, of the person accused, for a period not exceeding fifteen days at a time, and shall, if he does so, record his reasons for so doing." S. 72 requires that every investigation under the Act should be completed without unnecessary delay, and "as soon as it is completed the officer in charge of the section should prepare a report in the form prescribed therein. Then S. 74 provides that: "If the Officer in charge as aforesaid considers that there is sufficient evidence or reasonable ground of suspicion to justify him in so doing he shall—(a) forward the accused person to the Presidency Magistrate having jurisdiction...and (c) shall also send to such Magistrate the report prepared under S. 72."

In this case the investigation is not yet complete; no report was prepared (S. 72);

and none was sent to the Magistrate (S. 74). It is true that on February 4, the police applied to the Magistrate to make a requisition for the surrender of the petitioners by the Indore State, in accordance with Government Order No. 219, Political, April 12, 1875, and for that purpose certain information was supplied to him. But that fact does not lead to the necessary inference that the police investigation was then complete or that it should be deemed to be complete. For, even when a duly qualified police officer considers it necessary to take action under S. 70 of the Act, he has to submit "a report setting forth the substance of the information received and of the evidence adducible in the case"; and thereupon the Magistrate may "from time to time" authorize the detention of the accused person in police custody "after considering any information reduced into writing ...and examining any witnesses that he may consider necessary." The mere fact, therefore, that in this case the Chief Presidency Magistrate was furnished with certain information to enable him to make the requisition aforesaid, does not mark the completion of police investigation and the commencement of an inquiry or trial before him.

I, therefore, agree with the learned Magistrate in holding that at the material time the police investigation was not complete; that the petitioners were in police custody; that he had not taken cognizance of the said offences (S. 190, Code of Criminal Procedure, 1898); and that it was competent to him to make the order now sought to be revised.

In my opinion his order was right.

Macleod, C. J.—I agree. The whole fabric of the argument of counsel for petitioners was based on the suggestion that the petitioners were brought down from Indore to be handed over to the personal custody of the Magistrate. There is no extradition treaty between the Government of India and the Indore State; but by a recognition of the principles of international comity, effect was given to the request of the Agent to the Governor General for Central India that the petitioners should be handed over to the Bombay Police Officers. The fact that the Agent to the Governor General moved in the matter at the request of the Chief Presidency Magistrate does not in any way alter the fact that the petitioners

were under the arrest of the Bombay Police and arrived in Bombay in Police custody, so that the provisions of the City of Bombay Police Act were applicable.

Application rejected.

1925 BOMBAY 389

MACLEOD, C. J. AND COYAJEE, J.

Pandurang Shridhar Pathak and others
—Plaintiffs.

v.

Narhar Pandurang Atre and others —
Defendants.

Civil Reference No. 12 of 1924, Decided on 19th February 1925, made by the Commissioner, C. D.

Civil P. C., S. 152—Court sale under an order erroneously stating larger sum as due, cannot be set aside for the error.

When an error has been committed, it is always within the competency of the Court if nothing has intervened which would render it inexpedient or inequitable to do so, to correct the record in order to bring it into harmony with the order which the judge obviously meant to pronounce. Thus where a property is sold at a Court sale and made over to the auction purchaser, the Court which has ordered the sale, cannot set it aside under its inherent powers under S. 152, on the ground that the sale was ordered by a mistake for a sum larger than what was due under the decree. *Halton v. Harris* (1892) A. C. 54. *Foll.* [P 390 C 2]

A. G. Sathaye—for Judgment-debtors.

D. A. Tuljapurkar—for Decree-holders.

D. C. Virkar—for Purchaser.

Macleod, C. J.—We think that the order of September 25, 1923, made by the Subordinate Judge was beyond his powers and that, therefore, it must be set aside. On January 16, 1922, an order was passed that execution should proceed against the judgment-debtor in the case for Rs. 180. On March 25, 1922, another order was passed on the judgment creditor's application that the amount prayed for, namely, Rs. 443, should be realised by sale of the mortgaged property. The sale was held in pursuance of the latter order and the purchaser was put into possession. Later it was represented to the Judge that when the order of March 25, 1922, was passed, the order of January 6, 1922, was lost sight of, so that there was an irregularity in the sale. The Judge thought that he had inherent powers

under S. 152, Civil Procedure Code to set aside the order of March 25, 1922, and the sale held thereunder. So he ordered the amount paid by the auction-purchaser to be refunded and sent back the proceedings to the Collector to recover Rs. 180, and costs of the *darkhast* by sale of the mortgaged property or a sufficient part thereof. It might have been within the competence of the Subordinate Judge to alter the order of March 25, in which the figure '443' had been entered by an error. But we are of opinion that he had no jurisdiction to go further and set aside the sale which had taken place under that order, with the result that the rights of third parties* had arisen. In *Hatton v. Harris* (1), Lord Watson said (p. 560) :—

"When an error of that kind has been committed, it is always within the competency of the Court, if nothing has intervened which would render it inexpedient or inequitable to do so, to correct the record in order to bring it into harmony with the order which the judge obviously meant to pronounce."

The laches of the judgment-debtor has not been accounted for. He stood by and saw his property sold to recover Rs. 443, when the proper amount was Rs. 180, but the rights of third parties have now intervened and we cannot interfere with the right of the auction-purchaser to retain the property in the circumstances of the case.

We, therefore, make an order setting aside the Subordinate Judge's order of September 25, 1923, and directing that possession should be restored to the auction-purchaser. He is entitled to the costs of these proceedings from the judgment-debtor.

Our thanks are due to the learned pleaders who have argued this matter before us.

Order set aside.

(1) [1892] A.C. 547=62 L.J. P.C. 24=1 R. 1=67 L.T. 722.

1925 BOMBAY 390

MARTEN AND FAWCETT, JJ.

Juvansingji Motisingji Thakor—Appellant.

v.

Dola Chhala—Respondent.

Second Appeal No. 554 of 1923, Decided on 30th September, 1924, from the decision of the D. J. of Ahmedabad in Appeal No. 341 of 1921.

(a) *Bombay Land Rev. Code* (1879) S. 83—*Existence of tenancy shown for nearly 80 years—Origin not known—Tenancy should be presumed to be permanent and ancient.*

Where the plaintiff-tenant put in title deeds going as far back as 1835, in the earliest of which the land, was described as *pasatta* land, meaning 'land given in charity to Brahmans etc.' on a quit rent of Rs. 5 and where there was no evidence to show when the tenancy was created:

Held: that the tenant was entitled to the presumption under S. 83 of the Code, that he was a permanent tenant at a fixed quit rent.

[P. 391, C. 1]

(b) *Civil P. C., O. 8 R. 9*—*Court's permission is necessary for filing pleadings in reply to defendant's written statement.*

Under the ordinary practice in the mofussil of Bombay it is not customary for a plaintiff to put in a reply to the defendant's written statement; on the other hand Order 8, rule 9, requires the leave of the Court before any party can make a further pleading after the written statement has been filed. [P. 392, C. 1; P. 396, C. 1, 2]

(c) *Bombay Land Rev. Code* S. 83—*Proviso—'Usage' has to be proved by landlord.*

The usage referred to in S. 83 proviso has to be proved by the landlord. Landlord's right to enhance rent by usage in the case of *miras* tenures in Deccan has no application to *watan* land in Gujrat. [P. 394, C. 2]

G. N. Thakor and N. P. Desai—for Appellant.

H. C. Coyajee and G. S. Rao—for Respondent.

Marten, J.—The present parties have been engaged in litigation over the suit land ever since the year 1909, though the particular suit before us did not begin till 1916.

The question that arises is whether the plaintiff is a permanent tenant at a fixed quit rent or *salami* of Rs. 5 per annum as he contends, or whether he is only a tenant at will or annual tenant as the defendant Thakor Sahib contends. Or alternatively, if he is a permanent tenant, then whether the Thakor Sahib has any right to enhance the rent.

The land in question is in the village of Chaklosi in the Nadiad Taluka, and it forms part of a *watan* land belonging to the defendant who is the Thakor of Sonipur. The present Survey No. is 1280; the old No. was 1238; and its area is six acres and six *gunthas*. The meaning of *watan* is given in the first trial judgment in September 1917, and in effect it represents the portion (which is usually $\frac{1}{4}$ th) which was left in the possession of the Rajput Thakors by the Mahomedan invaders of Gujarat. The plaintiff's theory on which

this suit was brought was that the land was originally given to the plaintiff's Brahmin predecessors-in-title in *pasaita*. That expression is also explained in the same trial judgment as meaning land given in charity to Brahmins, temples etc. It may be either rent free or subject to the payment of *salami* or quit rent.

The plaintiff originally claimed that the field in question was of his absolute ownership and possession subject to this quit rent of Rs. 5. But it was held in both the Courts below that he was only a permanent tenant, and this finding is not challenged by the plaintiff before us. What we have to consider in this appeal are the contentions by the Thakor Sahib as an appellant which I have already alluded to.

Now, apart from the question of the rent note, which I will deal with later, the findings of the lower Courts that the plaintiff was a permanent tenant would appear to be justified in law on the facts as found by the lower appellate Court. The plaintiff put in title deeds going back to 1835, in the earliest of which the land is described as *pasaita* land and the last of which was a conveyance on sale to the plaintiff's father in May 1876, Exhibit 27. The identity of this land is challenged by the Thakor Sahib, but after looking at the map and the comparative statement set out at p. 23 of our paper book, but which does not appear to have been a formal Exhibit, we agree with the lower Court that the identity was established. As regards the northern and southern boundaries, they are substantially the same in the various deeds, viz., the Northern boundary being certain fields of the Thakor, and the Southern boundary being a road. The East and West boundaries cause more difficulties, partly because of the reference to fields by the names of the then owners, and partly because a narrow way is sometimes mentioned and sometimes not. But on the whole we consider that the identity is made out.

That being so, we have got the necessary antiquity for the origin of the tenancy to allow a presumption to be made under S. 83 of the Bombay Land Revenue Code, for no one can say how long prior to 1835 it was originally created. In particular the witnesses of the Thakor Sahib are quite unable to point to any definite date for its commence-

ment. Consequently, apart from the rent note which I have alluded to, the ordinary presumption under S. 83 of the Bombay Land Revenue Code would seem to apply.

But great stress was laid by counsel for the Thakor Sahib on certain rent notes which the plaintiff's father is alleged to have executed. It will be remembered that the plaintiff's father, Chhala Bhaiji, acquired this property on May 31, 1876, by the sale deed, Exhibit 27. The rent notes relied on by the Thakor Sahib are in order of date 1886, Exhibit 94; 1895, Exhibit 97; 1897, Exhibit 103; and 1898, Exhibit 96. There were two other intervening material dates, viz., that in 1885 the Thakor Sahib brought a suit in the Mamlatdar's Court, Exhibit 15, for a rent largely exceeding the rent of Rs. 5 and that that suit was unsuccessful. Similarly in 1892 he gave a notice, Exhibit 28, in effect calling on the plaintiff's father to pay an increased rent, or in default to quit.

As regards the first of these rent notes passed in 1886, that does not relate to the suit land at all. It relates to the next Survey Number 1281 which went by the name of the *Ganvatya* land. The other three Exhibits passed in 1895, 1897 and 1898 relate to both plots Nos. 1280 and 1281. The rent of plot 1280 is not thereby raised but is the same old rent of Rs. 5. But the clause relied on by the landlord is a clause at the end, which provides that the tenant is to give up possession at the end of the year of the tenancy. It was accordingly argued before us that having passed a rent note of that description, this was a complete answer to the plaintiff's claim of being considered a permanent tenant: and that we must accordingly reject the claim which he had advanced in that respect. The findings of fact, however, in the lower Courts are that these rent notes passed in 1895, 1897 and 1898 were obtained by misrepresentation, inasmuch as the alleged tenant thought they only related to the field No. 1281 and did not understand that they related to the field No. 1280. That he himself did not execute the document because he was illiterate; that he was not actually present at the time, and that the person who signed on his behalf did so at the request of the *Talati* of the Thakor Sahib.

It was argued before us that this amounted to an allegation of fraud or

misrepresentation against the officers of the Thakor Sahib, and that accordingly it ought to have been pleaded and an express issue raised upon it, and that, as this was not done, the evidence on the point should not have been admitted in the lower Court, and much less should any decision of the lower Courts have been founded on it, and that accordingly in this Court the plaintiff is not entitled to rely upon any such evidence.

As regards the pleadings, it must be borne in mind that it was not the plaintiff who was setting up the rent notes but it was the defendant. The rent notes are not referred to in the plaintiff's pleadings. Further, under the ordinary practice in the mofussil it is not customary for a plaintiff to put in a reply to the defendant's written statement. If the case had been one in the English High Court, a reply would be a matter of course. But even on the Original Side in Bombay it is not essential in many cases to put in a reply, and in others the express permission of the Court may have to be obtained for that purpose. Accordingly—I am speaking with experience of the Original Side—it frequently happens that the pleadings are left in what to an English trained lawyer is a defective state.

As regards the issues that were raised, they were in a broad general form and would enable this particular point to be gone into, inasmuch as the rent note would be relevant evidence on the issue whether the plaintiff was a permanent tenant or not. If the defendant was taken by surprise or had any objection to urge, he should have at once objected to the cross-examination of his witnesses to show that the documents were obtained by misrepresentation, and he could have at once taken the point that on the pleadings the plaintiff was not entitled to go into the point, or alternatively, if no amendment or a further reply was allowed, then the trial should stand over to enable the defendant to meet the evidence on this new point.

But in fact nothing of the sort was done. Although this suit dragged on for many years, no objection appears to have been raised at the trial. The learned Judge gave his judgment on the point; there was no objection raised on this score in the memo of appeal nor at its hearing before the lower Appellate Court. As far as we can see on the record

before us the first time that the point is taken is in the memo of second appeal to this Court.

Under these circumstances we think that having regard to the course which the trial and the first appeal took, no injustice or surprise has been suffered by the defendant, and it would be almost pedantic on our part to send this case back for a remand after eight years with a direction that certain formal pleadings should be put in, and that the parties should be at liberty if they like, to bring certain further evidence of which at present we have no idea of what it would consist. Counsel for the appellant in the course of extremely lengthy arguments to us did not venture to suggest that his client had any further evidence in his possession which would tend to negative the existing evidence as to misrepresentation which was before the Court at remanded trial in September 1921.

Next it was said that the evidence itself did not support the findings which the lower Courts put upon it, as in particular certain witnesses who are alleged to have stated certain matters said in fact nothing of the sort. It is not our province in second appeal to weigh the appreciation of evidence. But having regard to the allegation that certain evidence relied on by the lower Courts in fact contained no statements whatever of the sort alleged, we did read the evidence of several witnesses. One in particular, Exhibit 99, if it was accepted, was quite sufficient to establish the plaintiff's contentions in this respect. I do not propose to discuss the evidence of some of the other witnesses, who did not remember whether they were present at a particular time very many years ago.

Nor is this evidence at all inconsistent with the probabilities of the case. Seeing that Chhala, the plaintiff's father, had paid solid cash for this field, and that he had successfully resisted the efforts of the Thakor to increase the rent in the suit in the Mamlatdar's Court in 1885, and that he paid no attention to a notice to quit of 1892, it is somewhat surprising to find that he is alleged in 1895 and in two or three subsequent years to have acknowledged that he was merely an annual tenant and was obliged to quit at the end of the current year. The explanation that he thought the document related to the

other field of which he was an annual tenant is not an unlikely one. Or again it is possible that he may have thought that this document as regards No. 1280 only stated that he was a permanent tenant of that field at the rate of Rs. 5 per annum which in fact is the rent mentioned in these rent notes, but that he did not appreciate the importance of that clause at the end of the document about giving up possession, which was a proper clause as regards the other field No. 1281, but which would be fatal to his claim as regards the field No. 1280.

Further, it is to be observed that in the very first rent note of 1886, Exhibit 94, this was only in respect of field No. 1281 and not in respect of the suit field. We have on this an explanation from the appellant's counsel to the effect that in the books of the Thakor Sahib this land has been kept in the name or the Khata of somebody else, and that accordingly the rent note in respect of No. 1280 was given to or made out in the name of a different person. But here again it is important to observe that in the Mamlatdar's suit in 1885 the Thakor had sued as defendants not merely this other man in whose name this Khata is alleged to have stood, but also the plaintiff's father himself. I think it only fair to assume that thereby he was put on inquiry as to what interest the plaintiff's father had in the suit land No. 1280, and accordingly that if he had really thought that Chala, the plaintiff's father, was the sole tenant of No. 1280 as well as No. 1281, we should have had it so stated in Exhibit 94.

Nor, again, having regard to the findings of the Court on the question of illiteracy, would it at all be surprising to find that no permanent tenant would consciously enter into rent notes of the description in question if he had been fully aware of their legal significance.

Under these circumstances we see no reason to disturb the findings of fact in the lower appellate Court that these rent notes were obtained by misrepresentation and that they are not binding on the plaintiff's father nor on the plaintiff. That being so, we are left with the presumption under S. 83 of the Bombay Land Revenue Code which I have already referred to, unfettered by any difficulty caused by the rent notes. It follows, therefore, that in our judgment the finding of the lower appellate Court that the

plaintiff was a permanent tenant at a quit rent or salami of Rs. 5 was correct, and will be affirmed.

Next comes the point as to whether even if the plaintiff is a permanent tenant the defendant is entitled to enhance the rent. The section governing the matter is the proviso to S. 83 of the Bombay Land Revenue Code which runs:—
"Nothing contained in this section shall affect the right of the landlord (if he has the same either by virtue of agreement, usage, or otherwise) to enhance the rent payable, or services renderable by the tenant, or to evict the tenant for non-payment of the rent or non-rendition of the services, either respectively originally fixed or duly enhanced as aforesaid."

Now it is common ground that there was no agreement entitling the landlord to enhance the rent. But it is said there was a right in the landlord so to do by usage or otherwise within the meaning of this proviso. No evidence whatever in support of such right by usage or otherwise was put forward at either of the trials, but it was said that it was a well-known usage which was so clearly recognised by the Courts of this Presidency that we ought to take judicial notice of it and to hold it to be part of the settled law of the land. Alternatively it was said that once you get the relationship of landlord and tenant established, then *prima facie* the landlord has a right to raise the rent, unless some restriction on his power is established by the tenant. In other words the onus lies on the tenant to show that the landlord has not this right, and that the onus does not lie on the landlord to say he has the right.

Now taking the words of the section, which are after all the governing factor on the subject, I consider them as meaning that if the landlord can prove that he has the right to enhance the rent by virtue of an agreement, usage or otherwise, then he is to be entitled to do so. This construction is I think borne out by the judgment of Sir Lawrence Jenkins in *Rajya v. Balkrishna Gangadhar*. (1). That was not a case of watan land or alienated land as we have here, but of mirasi land in the Belgaum District. But there the Court had to consider this section, and at p. 422 Sir Lawrence said:—"What has hitherto been payable we know; all that has to be determined is the right to enhance. In

(1) [1905] 29 Bom. 415=7 Bom. L.R. 439

the first place, it must be determined whether what was paid was rent, and then whether the Inamdar has the right to enhance as against one who holds on the same terms as the defendant does. Agreement is out of the case, but it is said that the enhancement sought is sanctioned by usage; this, therefore, should be proved."

Further, amongst the issues sent down to the lower Court, issue 5 ran: Has the plaintiff the right by virtue of usage or otherwise to enhance as against the defendant? I have already said that the Thakor Sahib has adduced no evidence whatever in support of the alleged usage. It is said that we should now remand this case back to the lower Court in order to enable him to do so. During some fifteen years of litigation and eight years of the present litigation, there was ample opportunity for the defendant to ponder over the various judgments that were at intervals given by one or other of the various Courts before whom this litigation came. There was ample time for him to make up his mind what evidence and what sort of case he was going to prove before the Court. And really at this late stage to ask that he should be given this further opportunity is to my mind a request almost verging on absurdity. In any event I am quite satisfied that it would be most unjust to give that permission and that accordingly any such request should be refused.

Then comes the question of the authorities. We have been referred, in addition to *Rajya v. Balakrishna Gangadhar*, (1) which I have just cited, to *Prataprao Gujar v. Rayaji Namaji* (2) and the cases referred to in the notes at pp. 145 and 345; *Vishvanath Bhikaji v. Dhondappa* (3) *Laxaman v. Krishnaji* (4) and *Vyasacharya v. Vishnu*. (5). These cases have one common characteristic. They all relate to the Deccan; and most of them were in the Satara District or else in the Belgaum District. As regards the particular districts in which those cases arose, no doubt it has been laid down that the usage is clear and well recognised and must be given effect to. But there again they were all cases dealing with the rights of the Mirasdars, and they

were all or nearly all cases of unalienated land. In the present case we have not to do with the Deccan. We are dealing with Gujarat and Gujarat, does not know about *Mirasi* tenure. We are dealing here with alienated land, and if there is any substance—and there appears to me to be substance—in the contention of the plaintiff as to the origin of this tenure, we are again brought to another region of facts under which it may very well be that the tenancy was to be at a fixed rent for all time. If land is to be given in charity at a small quit rent, one could understand it as being a charitable gift though not so bountiful a one as if the land had been given out and out. But if in fact, as alleged, the charitable donor is to be entitled to enhance the rent at his pleasure and in effect to demand a rack rent then where is the charity? If the landlord gets the full value of his land, where is the religious merit and how could one say that anything has really been given?

Therefore there appears to me to be a broad distinction of fact between the lands we have to deal with in the present case and those the subject of the above reported cases. In the absence of any evidence whatever on the point, I utterly decline to accept those authorities as laying down a universal rule applicable to the whole of this Presidency. Nothing would have been easier than for the Thakor Sahib to have led even a sentence or two of evidence to that effect if it was the fact. I think too there is considerable force in the argument put forward by counsel for the plaintiff that if this is really the true state of the law in this Presidency, then why should the proviso to S. 83 be framed in this way? If the framers knew of this well established usage giving the right to the landlord in all cases to enhance the rents, then why should this proviso have been put in this limited form? In the view I take, the onus is thrown on the landlord to show that he has this right by agreement, usage or otherwise.

Curiously enough the same point came before my brother Fawcett and myself, on August 28, last in S. A. 553 of 1922 from the decision of the same learned District Judge of Ahmedabad Mr. D'Souza. There again the right to enhance was claimed in the appellate Court, but substantially no evidence had been led in the trial Court. On appeal to us in the state of the evi-

(2) [1878-79] 3 Bom. 141=(1878) P. J. 273.

(3) [1893] 17 Bom. 475.

(4) [1907] 9 Bom. L. R. 861.

(5) [1919] 44 Bom. 566=58 I. C. 289=22 Bom. L. R. 717.

dence in the case then before us, we declined to hold that the landlord in that case had any power to enhance the rent in the way in which he claimed. Mr. Thakor, who appears for the Thakor Sahib in the present case, was also counsel for the Talukdar in the other case, and he has stated to us that in the previous appeal he did not urge with sufficient force nor with sufficient reference to authorities this present contention as to the rights of the landlord to enhance the rent. I accept his recollection that he did not then refer us to the authorities which he has cited to us in the present case. But it may perhaps ease his mind if I were to say that even if he had cited these cases, it would not have made the slightest difference in the result of our judgment, although naturally we appreciate the industry of counsel in bringing to our attention in the present case all relevant authorities that he can find. Certainly so far as my recollection of the previous appeal goes as is my recollection of the arguments in the present case, Mr. Thakor has urged and urged at length and with strength all possible arguments that could be taken on behalf of his client. Therefore it cannot be said that there is any fault on the part of counsel that the Court arrived at that particular decision.

In the present case I am happy to think that our decision that the plaintiff is a permanent tenant at a fixed rent is I believe entirely in accordance with the facts and justice of the case. On the facts as we have them, this man and his predecessors-in-title have been in possession of this land at a quit rent ever since 1835, and they have up to now successfully disputed the right of the landlord to alter that rent as has been attempted in comparatively recent years. I have little doubt that the present Thakor Sahib or his predecessors did not take proceedings in 1885, or again in 1892, because they knew that right was on the side of the plaintiff. It is without any hesitation accordingly that I would confirm the decision in favour of the plaintiff which has been arrived at by the lower Court and dismiss this appeal with costs.

My brother Fawcett has reminded me that there is one other point which I should have referred to. It was contended in the lower Court that even if the plaintiff was an annual tenant or must be

deemed to be so by having passed old rent notes, yet he had successfully asserted his right to be a permanent tenant, and that accordingly he must be taken to have been in adverse possession *qua* permanent tenancy notwithstanding his signature on these rent notes. Our finding that the rent notes are not binding on the plaintiff renders it unnecessary for us to express an opinion on that point. Speaking for myself we have not heard the full arguments on the point or indeed any argument from the plaintiff. Under these circumstances I personally shall express no opinion whatever on that point, nor whether it was rightly decided in favour of the plaintiff in the Court below.

Fawcett, J.—My learned brother has dealt so fully with the points arising in this appeal that I need only add a few remarks.

The learned District Judge decided the appeal before him in favour of the plaintiff-respondent on two grounds. The first of these was that by his open assertion to the knowledge of the defendant Thakor of his right to hold as a permanent tenant at a fixed rental of Rs. 5 per annum, he had acquired by adverse possession the status of a permanent tenant holding at a fixed rate. The learned counsel for the appellant has drawn our attention to certain rulings of the Privy Council which support the view that the plaintiff could not legitimately be held to have acquired this status by adverse possession, inasmuch as the defendant could not have taken steps merely on account of that assertion to recover possession of the land in suit. The rulings in question are those of *Mohammad Mumtaz Ali Khan v. Mohan Singh* (6) and *Madhavrao Waman Saundalgekar v. Raghunath Venkatesh Deshpande* (7). It may be that in view of those rulings the view taken by this Court in cases like *Budesab v. Hanmanta* (8) and *Thakore Fatesingji v. Bamanji A. Dalal* (9) may have to be reconsidered, although at any rate in the former of

(6) 1923 P. C. 118 = 45 All. 419 = 50 I. A. 202 = 26 O. C. 231 = 21 A. L. J. 757 = 45 M. L. J. 623 = 33 M. L. T. 321 = 19 L. W. 289 = 10 O. L. J. 383 = 39 C. L. J. 295 (P. C.)

(7) 1923 P. C. 205 = 47 Bom. 798 = 50 I. A. 255 = 25 Bom. L. R. 1005 = 33 M. L. T. 389 = (1923) M. W. N. 689 = 28 C. W. N. 857 = 47 M. L. J. 248 (P. C.)

(8) [1897] 21 Bom. 509.

(9) [1903] 27 Bom. 515 = 5 Bom. L. R. 274.

those cases the fact that an attempt to evict a tenant had been made under the Mamlatdar's Court Act, is a special consideration which may alter the application of the general principle laid down in *Nainapillai Marakayar v. Ramathan Chettiar* (10), by the Privy Council.

But in the present case it is not necessary—and in my opinion undesirable—to consider this question, because the learned District Judge has also decided in favour of the plaintiff on other grounds, which in my opinion are amply sufficient to support his decree, and any remarks which we might make on this particular question would be merely *obiter dicta*.

Both the lower Courts have held that the plaintiff has succeeded in showing circumstances that justify the presumption being raised in his favour which is allowed by S. 83 of the Bombay Land Revenue Code. So far as such finding can be challenged in second appeal, I am clearly of opinion that there is no sufficient ground for our interference.

As regards the point of identity of the land, the defendant, if he wanted to rely upon the description of the boundaries in the different deeds as showing that the land mentioned in one or other of them could not possibly be identical, should have directly raised that point in the cross-examination of the plaintiff and given him an opportunity of explaining any differences that there are in respect of the description of the boundaries. So far as I can judge from the materials before us, there is nothing which makes it impossible that the boundaries should be the same, and a good deal which favours their really being so. I do not think that we have any good ground for not accepting the finding of the learned District Judge as to the identity of the plaintiff field mentioned in the several documents produced by the plaintiff.

Then as regards the question arising about the circumstances under which the plaintiff's father passed certain rent notes to the defendant, I have little to add to what my learned brother has said. The Civil Procedure Code by Order VIII, rule 9, requires the leave of the Court before any party can make a further

pleading after the written statement has been filed, and I can corroborate the statement of my learned brother that it is not the practice in the mofussil for the plaintiff to put in a counter statement to the defendant's written statement. The point about the alleged misrepresentation really arose out of the cross-examination of certain witnesses adduced by the defendant, and the circumstances are very like those that arose in *Riding v. Hawkins* (11), where upon cross-examination of the defendant an occasion arose for a plea being put in about misrepresentation with the leave of the Court.

This is not a case where the plaintiff from the very start set up that there was a misrepresentation on the part of the defendant in regard to certain documents, and so as to require an affirmative plea of misrepresentation by him in the first instance which is the ordinary case where the rule applies that fraud or misrepresentation must be properly pleaded and particulars given. In the present case all that I think can legitimately be said is that the plaintiff's pleader should have raised an issue on this point at the time the issues were framed, because undoubtedly the defendant had pleaded these rent notes. Therefore it can fairly be said that so far as the defendant was disputing the legal effect of the rent notes, his pleader should have asked the Court to frame an issue on the point.

But the mere fact that no such issue was framed is not a sufficient ground for our interfering with the decree of the lower Court in this second appeal. In support of that view I may refer to the Privy Council case of *Mt. Mitna v. Syud Fuzli Rub* (12) where their Lordships say at p. 582 as follows:—

"In this case the omission to raise the issues was brought before the notice of the appellate Court; the appellate Court expressed its regret, and their Lordships are glad to observe that it did express its regret that the Principal *Sudder Ameen* had omitted to settle the issues. The Court however, nevertheless conceived that it was not under any positive obligation to remand the case; but seeing that the parties had gone to trial knowing what the real question between them was, that

(10) 1924 P. C. 65=47 Mad. 337=51 I. A. 83=5 L. R. P. C. 33=19 M. L. W. 259=22 A. L. J. 130=34 M. L. T. 10=(1924) M. W. N. 293=46 M. L. J. 546=28 C. W. N. 809 (P. C.)

(11) [1889] 14 P. D. 56=58 L. J. P. 48=60 L. T. 869=37 W. R. 575.

(12) [1869-70] 13 M. I. A. 573=6 B. L. R. 148=15 W. R. 15 (P. C.)

the evidence had been taken, and that the conclusion had been in the opinion of the appellate Court correctly drawn from that evidence, they thought it within their competence to affirm that decision without sending the case back for a re-trial. Their Lordships sitting here are not prepared to say that the Court had not power to do so under the 354th section (which corresponds to Order 41, rule 25, of the present Civil Procedure Code) of the Civil Procedure Code. At all events, it appears to their Lordships that there is nothing in the Code which made it imperative on the appellate Court or now makes it imperative upon their Lordships, to yield to that objection, and therefore, fully concurring in the observations made by the appellate Court that it was the duty of the Judge to settle the issues, and that it was much to be regretted that he omitted to settle those issues, they still think that, under all the circumstances of the case, substantial justice having been done, there has not been that fatal mistrial of the cause which vitiates all the proceedings and renders a new trial necessary."

So, here, I think there is no question of surprise arising, and that S. 99 of the Civil Procedure Code applies. There has been at the most an irregularity which does not justify our interference in second appeal. And after all quite apart from any allegation of misrepresentation, the question is substantially one of what is the weight to be given to the admissions which are relied upon in these particular rent notes. That is the point of view from which both the lower Courts have really addressed themselves to the question, and it is a point of view which from very early times has been one which has been authorised by the decisions of this Court.

One of the earliest cases dealing with the question of admissions in rent notes passed by illiterate cultivators is *Gangaji v. Sakharam* (13), which is referred to by Sir Lawrence Jenkins in *Raghunath v. Lakshuman* (14). There is also the recent case of *Ram Ranchod v. AbdulRahim* (15), which is mentioned in the judgment of the lower Courts, where it was held on general grounds that it would be unsafe to rely upon a particular admission of

being a tenant-at-will in a rent note contrary to evidence showing that the tenant had been asserting a right to permanent tenure, and continued to hold the land.

In the present case the fact that these rent notes include a piece of land, to which the stipulation as to giving up the land at the end of the year could properly apply, is a clear ground for not giving the rent notes the weight they might otherwise have. Quite apart from any deliberate misrepresentation by the Thakor or his Talati, the Court would be clearly justified in saying that it cannot attach any real weight to the admission, and of course an admission is not in itself conclusive. I think, therefore, that the conclusion of the lower Courts that a presumption of permanent tenancy arises in favour of the plaintiff is correct and is binding upon us in second appeal.

As regards the question of the defendant's right to enhance the rent, no doubt inasmuch as the plaintiff asked for a declaration that the defendant had no right to enhance the rent, the onus of proof would in the first instance rest upon him under Ss. 101 and 102 of the Indian Evidence Act, that is to say, if neither party adduce any evidence about this right to enhance, the plaintiff would fail not having sustained the onus upon him. But after the plaintiff had adduced evidence that he and his predecessor-in-title had been in possession of this particular land under circumstances which justify a presumption in plaintiff's favour under S. 83 of the Bombay Land Revenue Code and that they had paid a uniform rental for a long number of years, the onus was clearly shifted on to the defendant to show that by agreement, usage or otherwise he still had a right to enhance the rent. I agree with my learned brother that the last para. of S. 83 of the Bombay Land Revenue Code contemplates the landlord having to satisfy that onus. But quite apart from that, I think that under ordinary rules of evidence the onus in this case would lie upon the landlord, and in view of his having adduced no evidence at all on this particular point, I cannot see that there is any ground for our interfering with the view taken by the District Judge, viz., that the right to enhance is not one which is inherent in the defendant, and that he has failed to satisfy the onus that lies upon him in that respect.

(13) [1885] P. J. 156.

(14) [1899] 2 Bom. L. R. 93.

(15) [1920] 22 Bom. L. R. 1214—59 I. C. 278.

I agree with all that my learned brother has said as to the rulings about the right to enhance the rent in the case of Mirasdar being entirely inapplicable to the present case. I think that possibly, if the defendant had set up the right to enhance the rent on the ground that this land had been originally granted in charity and improperly alienated by the grantees so as to divert the profits from the charitable institution, he might have been able to show some foundation for his claim to enhance the rent. The case is in some respects analogous to that of Government granting land as a devasthan inam and resuming it by the levy of full assessment from the existing owner, where the profits of the inam land have been diverted from the institution itself, or the institution itself has ceased to exist or to be used as such. This is done either under the conditions of the sanad on which the land is given, or under the general declaration that land held on behalf of religious or charitable institutions wholly or partially exempt from the payment of land-revenue shall not be transferable from such institutions either by assignment, sale, gift, devise or otherwise howsoever, which is contained in clause 3 of S. 8 of Bombay Act II of 1863. But there is no corresponding clause in Act VII of 1863 which applies to Gujarat, and it has been held that full assessment cannot be legally levied in the case of alienation of endowed property : see *Shankarlal Tapidas v. The Secretary of State for India* (16). Therefore, so far as the analogy of Government lands is concerned, the case for the defendant put on this footing would naturally be somewhat weak. In any case the defendant has not set up any such contentions. He has adopted the defence that this land was never given in inam, that it was part of his ordinary watan land, that the plaintiff was an ordinary tenant-at-will, and that on ordinary general principles the Court should decide in his favour. In these circumstances there is obviously no ground for any inquiry into the possibility I have mentioned. The point should have been properly raised in the suit, if it was going to be raised at all, and I think that, as the defendant has chosen not to set up any such claim or to adduce any evidence,

he must suffer the consequences, and he has only himself to blame if thereby he loses what he might otherwise have been allowed.

I concur, therefore, that this appeal should be dismissed with costs.

Appeal dismissed.

1925 BOMBAY 398

MACLEOD, C. J., AND COYAJEE, J.

Lakshman Santa Sintre—Defendant—Applicant.

v.

Balkrishna Keshav Shetye—Plaintiff—Opponent.

Civil Extraordinary Application No. 106 of 1925, Decided on 16th April 1925.

Bombay Rent (War Restriction) Act, (2 of 1918)—Premises occupied mainly for dwelling purposes—Tenant also carrying on business in the premises—Premises are to be deemed as used as dwelling house.

The fact that a tenant carries on business or works in the same premises, which he uses for dwelling in, cannot thereby prevent those premises coming within the category of premises used as a dwelling house. [P 399, C 1]

Amdekar and *S. D. Sapre*—for Applicant.

A. G. Desai—for Opponent.

Macleod, C. J.—The plaintiff sued to eject the defendant from certain premises which had been rented by him. The defendant pleaded that the premises were used as a dwelling house and claimed protection under the Bombay Rent (War Restrictions) Act, 1918. The Act is to remain in force up to December 31, 1925, in respect of any premises used as a dwelling house, and up to August 31, 1924, in respect of any other premises by virtue of the provisions of S. 2 of Bombay Act III of 1923. If, then, the defendant could show that the premises occupied by him were used as a dwelling house, he would be entitled to protection. The evidence before the Judge with regard to the character of the occupation is somewhat meagre. It was admitted by the defendant that he worked as a tailor on the premises, but he said in cross-examination that he used the premises as his residence and had been residing there in for five or six years. If, then, as a matter of fact the defendant and his family had been residing on the premises,

(16) [1919] 43 Bom. 583 = 51 I. C. 910 = 21 Bom. L. R. 668

meaning thereby that they slept there and took their meals there, the mere fact that during the day time defendant worked as a tailor on the same premises, would not prevent it being said that the premises were being used as a dwelling house. We do not know what view of the law the Judge took. He might have thought that because the defendant admittedly worked as a tailor on the premises, he could not also allege that the premises were used as a dwelling house. On that question of law, if premises are used for the purposes of residence, then the protection continues with regard to such premises, and does not cease merely because the protection in respect of other premises under the Rent Act ceased on August 31, even though a portion of such premises may be used for business purposes. The fact that a man carries on business or works in the same premises, which he uses for dwelling in, cannot thereby prevent those premises coming within the category of premises used as a dwelling house.

We think then that the rule must be made absolute and the case must be returned to the Judge for trial on the issue whether as a matter of fact the defendant resided on the suit premises. There does not seem to have been sufficient evidence produced by the defendant to show that he had slept on the premises or taken his meals there, and that he used the premises as a residence for himself and his family. Costs, costs in the cause. Liberty to the parties to adduce further evidence. Execution of the decree to be stayed.

Rule made absolute.

★ ★ 1925 BOMBAY 399

MACLEOD, C. J. AND COYAJEE, J.

Shripad Dattatraya Kamat—Appellant.
v.

Vithal Vasudevshet Parker and others—Respondents.

Second Appeal No. 700 of 1925. Decided on 23rd February 1925, from the decision of the D. J. Ratnagiri, in Appeal No. 136 of 1923.

★ ★ *Hindu Law—Adoption—Husband's brother can be validly adopted.*

Under Hindu Law the adoption of husband's brother is valid. [P 400, C 1]

P. B. Shingne—for Appellant.

G. B. Chitale—for Respondents.

Macleod, C. J.—This was a suit to recover money on a mortgage by sale of the mortgaged property. The mortgage was admittedly passed to one Damaji Raghunath. After Damaji's death his widow Anandibai adopted Dattatraya. On Dattatraya's death his widow adopted the plaintiff, the brother of Dattatraya. The defendants disputed the fact of both adoptions, and also contended that Dattatraya being plaintiff's brother, plaintiff could not validly be adopted by Dattatraya's widow. The adoption was held proved but the plaintiff's suit was dismissed on the ground that the 'brother' was expressly mentioned as a person who could not be adopted in the Dattaka Mimamsa, section V, clauses 16 to 19. The appeal to the District Judge was summarily dismissed for the same reason. It is unfortunate that neither of the learned Judges in the Courts below considered the series of Bombay authorities on this question.

In *Mallappa Parappa v. Gangava* (1) it was held that the adoption of the father's first cousin was not invalid under Hindu law. Mr. Justice Shah at p. 216 said :—

"There is nothing in the Mitakshara or the Vyavahara Mayukha expressly bearing on this point. I mean there is no express prohibition to adopt the father's first or distant cousin. As to the opinion expressed by Nanda Pandita in the Dattaka Mimamsa, S. 5, clause 17 relating to the paternal uncle, I am by no means clear that the word used there for paternal uncle, viz., *pitruvya* (पितृव्य) means anything more than father's brother (पितृभ्राता); but assuming that it includes an elderly relation in the position of the first cousin of the father, it is clear that the opinions expressed by Nanda Pandita in clauses 16 to 20 have been held in a series of decisions of this Court ending with *Gajanan Balkrishna v. Kashinath Narayan* (2) to be recommendatory and not mandatory except as to three specific cases of daughter's son, sister's son, and mother's sister's son as regards the three regenerate classes."

In *Yamnava v. Laxman Bhimrao* (3)

(1) [1919] 48 Bom. 203=49 I. C. 517=21 Bom. L. R. 17.

(2) [1915] 39 Bom. 410=28 I. C. 978=17 Bom. L. R. 372.

(3) [1912] 36 Bom. 533=16 I. C. 180=14 Bom. L. R. 543.

Sir Narayan Chandavarkar expressed his conclusion as follows (p. 535), :—

“ Now, in the present case we have the light thrown upon the placita referred to by other placita in the Dattaka Mimansa. In S. 2, placita 107 and 108, Nanda Pandita, after discussing among other questions the question who is eligible for adoption, clinches the matter by citing the authority of Sakala who says: ‘ Let one of a regenerate tribe destitute of male issue, on that account, adopt as a son, the offspring of a *sapinda* relation particularly: or also next to him, one born in the same general family: if such exist not, let him adopt one born in another family: except a daughter’s son a sister’s son and the son of the mother’s sister.’ And then in placitum 108, Nanda Pandita draws his conclusion: ‘ By this it is clearly established that the expression ‘sister’s son’ is illustrative of the daughter’s son, and mother’s sister’s son, and this is proper, for prohibited connection is common to all three.’ ‘Prohibited connection’ here means what is called *virudha sambandha*.’ Nanda Pandita in clear terms tells us that the words ‘sister’s son, stand for the sister’s son and also for the daughter’s son and mother’s sister’s son and the implication is that they do not extend to any other son. Where a general rule is prescribed and an exception is made to it, the latter must be confined to the cases specified as falling within the exception...If that is so, then it is a reasonable inference to draw from the whole of the Dattaka Mimansa that Nanda Pandita intended that anybody could be adopted, so long as he was not within the cases specified as prohibited. So long as, that is, he was not the sister’s son, or the daughter’s son, or the mother’s sister’s son.”

This decision was followed in *Ramkrishna v. Chimnaji* (4) and *Gajanan Balkrishna v. Kashinath Narayan* (2). And if we were to hold in the face of those decisions that the adoption of the husband’s brother was invalid, we should be going contrary to the opinion expressed by so many of the Judges of this Court in the cases we have referred to.

But the question appears to have been conclusively settled by the decision of the Privy Council in *Puttu Lal v. Mt. Parbati*

(4) [1913] 15 Bom. L. R. 824=21 I. C. 34.

Kunwar (5) where it was held that a Hindu widow making an adoption by virtue of her deceased husband’s authority could validly adopt her brother’s son. Reference was made to the decision of Mr. Justice Banerji in *Jai Singh Pal Singh v. Bijai Pal Singh* (6), where it was pointed out that on this question as to whether a widow can lawfully adopt to her deceased husband a son of her own brother, Nanda Pandita in the Dattaka Mimansa extended to adoption by females the rule of Hindu law that no one can be adopted as a son whose mother the adopter could not have legally married, an extension which was not based upon the authority of any of the Smritis or institutes of sages, and their Lordships said (p. 555):—

“ As Banerji, J. further pointed out in the same case the extension of the rule by Nanda Pandita is not supported by any text of the ‘Dattaka Chandrika,’ or by any of the texts of the sages Saunaka and Sakala from which most of the rule of the ‘Dattaka Mimansa’ were deduced. It has not been shown to their Lordships that the extension by Nanda Pandita to which they are referring has been accepted as the law in India, at least, so far as the adoptions by widows to their deceased husbands are concerned.”

We allow the appeal and pass a decree for the plaintiff for Rs. 350, and costs throughout, and interest on Rs. 200 at six per cent. In default of paying the decretal amount within six months of the proceedings reaching the lower Court, the plaintiff to be at liberty to apply for a final decree for sale.

Appeal allowed.

- (5) [1915] 37 All. 359=42 I. A. 155=19 C.W.N. 841=13 A.L.J. 721=17 Bom. L.R. 549=22 C.L.J. 190=29 M.L.J. 69=18 M.L.T. 61=29 I. C. 617=2 L. W. 881=(1915) M.W.N. 514 (P.C.)
(6) [1905] 27 All. 417=2 A. L. J. 36=(1905) A.W.N. 20.

1925 BOMBAY 400

PRATT, J.

Dhanrajgirji Narsingirji—Plaintiff.

v.

W. G. Ward—Defendant.

O. C. J. Suit No. 3379 of 1924, Decided on 1st December 1924.

Bombay Rent (War Restrictions) Act (2 of 1918)
 S. 13—House held under lease — Part of premises
 let out by lessee—Rent of part sub-let forms basis
 of standard rent.

Where a person takes on lease for a certain sum an entire building from its owner and lets out portions of it to different tenants, the "standard rent" for the portion so let out is to be fixed on the basis of the amount at which it was let and not on the basis of the amount at which the building was taken on lease. S. 13 (a) of the Act contemplates a case where there is no letting of the part at the period at which the basic rent has to be determined but the whole is let at that period and the basic rent or standard rent of the part has to be ascertained with reference to the letting of that whole.

[P 402 C 1]

F. S. Taleyarkhan—for Plaintiff.

Pocock—for Defendant.

Pratt, J.—The plaintiff is the owner of a building in Bombay known as Watson's Annexe which is let out in flats.

The defendant is a tenant of one of those flats on a monthly rental of Rs. 97. The plaintiff gave notice to quit on February 4, 1924, terminating the tenancy as from April 1, 1924. The defendant claims the privilege of S. 9 of the Rent Act, and also contends that the rent that he is paying is in excess of the standard rent.

The main issue in the suit is what is the standard rent of the premises and in order to ascertain that, it is necessary to state briefly the terms on which the premises have been held.

The whole building known as Watson's Annexe is situated on a property which was leased by the Port Trust to the plaintiff for a term of fifty years. The plaintiff leased the whole building to one Dr. Billimoria on March 24, 1915 at a rental of Rs. 2,850, besides Rs. 649 ground-rent and Rs. 98 taxes, making a total of Rs. 4,479. Dr. Billimoria sub let the premises in different flats to different tenants and the premises which are now in the occupation of the defendant were first sub-let before January 1, 1916, at a rental of Rs. 75 in September, 1915.

The tenancy of Dr. Billimoria was terminated by a consent decree as from July 31, 1923, and from August 1, 1923 the defendant, held directly under the plaintiff as his tenant. The standard rental of the flat if calculated on the first letting prior to January 1, 1916, would have to be calculated on a basic rent of Rs. 75, but at the same time the flat was also part of the whole building which was held by Dr. Billimoria at a rental of Rs. 4,479.

1925 B/51 & 52

In the calculation of the standard rent, the first question that arises is whether the standard rent should be calculated on the actual basic rent of Rs. 75 or whether it is to be ascertained by an apportionment of the rent which Dr. Billimoria the lessee of the whole building was then paying to the plaintiff? The plaintiff's contention is that the standard rent is to be calculated on the basic rent of Rs. 75 and the defendant contends that the standard rent should be calculated by an apportionment of Rs. 4,479. The defendant's contention is based on the case of *Chapsey Umersey v. Keshavji Damji* (1). In that case, a godown was leased to the plaintiff at a rental of Rs. 305 and the plaintiff again sub-let the same godown at a rental of Rs. 275. Question then arose as to what was the standard rent and Setalvad, J. decided that in a case of concurrent letting there could not be two standard rents, following the case of *King v. York* (2) where it was said that the Act operated *in rem* and not *in personem*, and that there should be one standard rent for the premises and not different standards with respect to different lettings to different individuals. Setalvad, J., therefore, decided that although the same godown was let to two different individuals for two different sums, the standard rent was the rent for which the godown was let for the first time. So here it is contended that the standard rent should be the rent at which the premises were first let to Dr. Billimoria and that that rent should be ascertained by apportionment. There seems to me to be this distinction between the cases that, whereas in *Chapsey Umersey v. Keshavji Damji* (1) the same premises were let a second time, here the premises that are let a second time are not the same premises. No doubt the defendant's flat is a part of the whole building of Watson's Annexe but although it is a part of the whole building, it is obvious that the premises constituting the whole building are different from the premises constituting a part of the building. The case is not one in which jurisdiction to apportion rent arises under S. 13 (a) of the Act; for that section contemplates a case where there was no letting of the part at the period at which

(1) [1921] 45 Bom. 744=60 I. C. 960=23 Bom. L. R. 183.

(2) [1919] 8 W. N. 59.

the basic rent has to be determined but the whole is let at that period and the basic rent or standard rent of the part has to be ascertained with reference to the letting of that whole. So here, if, prior to the Rent Act coming into operation, this flat had not been let but the whole building only had been let to Dr. Billimoria, then the standard rent would have to be apportioned as prescribed by S. 13 (a). It seems to me, therefore, that the case does not fall either within the rule in *Chapsey Umersey v. Keshavji Damji* (1) or within S. 13 (a) of the Rent Act.

The Rent Act itself in the definition of the premises refers to part of the building separately let as premises of which the standard rent has to be determined and such standard rent must be determined with reference to those premises in the manner specified by S. 2 (1) (a) of the Act. The standard rent, therefore, must be ascertained on the admitted basic rent of Rs. 75. Any other system of ascertainment would lead to extraordinary difficulties. For instance, in the present case, if the lease by the Port Trust to the plaintiff had not been merely a lease of the site but had been a lease of the site and the building, there would have been two concurrent leases of which the apportionment could be claimed and there was no principle on which one lease should be taken into calculation instead of the other. Again if the head lease instead of being as here the lease of one building consisting of flats had been a lease of a large number of buildings constituting a large estate, it would be almost impossible to make a correct apportionment of the rent. I do not think it was the intention of the Rent Act that landlords and tenants should be driven to do a difficult and expensive process of valuation and calculation before their rent could be ascertained.

I, therefore, decide the standard rent must be ascertained on the basic rent of Rs. 75.

Mr. Taleyarkhan admits that he is unable to prove that notice of increase had been given. The standard rent is, therefore, Rs. 75 plus Rs. 15=Rs. 90. Mr. Taleyarkhan does not press for eviction on the understanding that arrears of rent will be paid on or before the 6th instant.

Decree, therefore, for plaintiff for arrears of rent and compensation from September 1, 1923, to November 30, 1924, at

the rate of Rs. 90 per mensem. In default of such sum being paid on or before the 6th instant decree for possession. If such sum is paid defendant to continue as a statutory tenant. No order as to costs.

Suit decreed.

★ ★ 1925 BOMBAY 402

MACLEOD, C. J. AND COYAJEE, J.

Hanmant Subbaya Naik—Appellant.

v.

Krishna Manjunath Yaji—Respondent.

Appeal No. 1 of 1924, Decided on 10th February 1925, from an order passed by the D. J., Karwar, in C. A. No. 14 of 1923.

★ ★ *Hindu Law—Alienation by widow—First adopted son dying, second son adopted—Second son can challenge independently.*

An adopted son has, by virtue of his adoption, an inherent right to question any alienation by his adoptive mother before his adoption and the fact that there had been a previously adopted son could in no way affect that right. The second adopted son does not succeed to the first adopted son nor is he the representative of his, and therefore whether the mother as widow of the original holder made the alienation before the first adoption while she held a widow's estate, or after the death of the first adopted son, when she would be holding as his heir, would make no difference to the rights of the second adopted son to question her alienation. [P 403 C 2]

S. S. Patkar and D. R. Manerikar—for Appellant.

M.R. Jayakar with G.P. Murdeshwar—for Respondent.

Facts.—The plaintiff sued to recover possession of the suit property with past mesne profits. He had been adopted by one Venkamma on May 26, 1915. On April 25, 1903, Venkamma had given the suit property on Mulgeni to one Manjunath. On April 30, 1903, she adopted one Ramkrishna born on June 14, 1900. On December 17, 1914, Ramkrishna died a minor. The present suit was brought on February 7, 1922. The lower Court dismissed the suit as time-barred.

In first appeal it was contended that Venkamma could only adopt to her deceased husband, that the second adopted son was in no way the representative of the first adopted son and therefore the cause of action accrued on the date of his adoption. On the other hand the defendant argued that the second adopted son was the representative of the first adopted son and therefore the suit was time-barred. The District Judge held that by his adop-

tion, plaintiff obtained the right to question his adoptive mother's alienations and that it was in virtue of his adoption an inherent right, and no valid ground had been shown for holding that the right had been barred. Accordingly the order of the lower Court was reversed and the suit was sent back to be tried on the merits. The defendant appealed.

Macleod, C. J.—[His Lordship after stating facts as above proceeded.]

There is no direct authority for the point arising in this appeal. We have been referred to the case of *Gobindo Nath Roy v. Ram Kanay Chowdhry* (1). A Hindu widow succeeded to the estate of her adopted son on his death as his heir. She then alienated the suit property and subsequently adopted another son. It was held that a subsequent adoption could not divest the alienee of his rights under the alienation previously effected. Jackson, J. relied upon the decision of *Mt. Bhoobun Moyee Debia v. Ram Kishore Acharj Chowdhry* (2) in deciding that the subsequent adoption of another son by the widow could not divest the alienee of his rights under the alienation made by her before adoption. But that case does not seem to be an authority for that proposition. The head note runs thus:—

"In the year 1811, G being childless, executed a deed of...permission by which he gave power to his wife, C, to adopt a son. He afterwards had a son, B, by his wife, C. In 1819, two years after his son's birth, and while he was living, G executed another instrument giving the widow, his wife, permission: to adopt.... B, on coming of age, succeeded to the ancestral and other estate of his father who had died. On B's death, childless, his widow succeeded as heir to her deceased husband, taking a vested estate in the whole of his estate. Some time after B's death, C, his mother, exercised the power given her by the instrument of 1819, by adopting a son to G."

"It was held that "B, the son was the last full owner and his wife succeeded at his death, as his heir to her widow's estate, and, consequently, that the adoption by C, under the...[instrument] was void, as the power was incapable of execution."

There does not appear to have been any contest between an adopted son and an

alienee from the widow before adoption. The Calcutta Court seemed to consider, on the authority provided by that decision, that the suit was time-barred because it ought to have been brought within three years from the date of the death of the first adopted son, although the alienation had been made after the first adopted son had died and while the widow was his heiress. This case is referred to by Mayne in his 'Treatise on Hindu Law and Usage,' 9th Edition, at page 270 in the following passage:

"A widow adopted a son under the authority of her husband. She succeeded him as his heir, and made an alienation, and then adopted another son. The Court held that the alienation was good as against the second adopted son [*Gobind Nath v. Ram Kanay Chowdhry* (1)]. The decision was given without any inquiry as to the propriety of the alienation, and was rested on the authority of *Chandrabullee's case*. It does not seem to have occurred to the Court that a mother had no more than a limited estate, which, upon the authority of the case cited, was divested by the adoption. The son then came in for all rights which had not been lawfully disposed of or barred, during the continuance of that estate.....It may now be considered as settled law, first, that if a widow exceeds the powers conferred upon her by law, her acts in so far as they are in excess of those powers can be set aside by a subsequently adopted son as from the date of his adoption: secondly, that as the adoption immediately divests the widow's estate, it equally divests the estate of any one claiming under a title derived from her."

The question really then in this case is whether the plaintiff acquired by virtue of his adoption an inherent right to question any alienation by his adoptive mother before his adoption, and, it does not seem to me that, the fact that there had been a previously adopted son could in any way affect that right. The second adopted son did not succeed to the first adopted son. Whether the mother as widow of the original holder made the alienation before the first adoption while she held a widow's estate, or after the death of the first adopted son, when she would be holding as his heir, would make no difference to the rights of the second adopted son to question her alienation. We think, therefore, that the District Judge

(1) [1875] 24 W. R. 183.

(2) [1865] 10 M.I.A. 279=3 W. R. 15 (P. O.)

was right in holding that the plaintiff was not the representative of the first adopted son, and that the suit was not barred by limitation. The appeal, therefore, must be dismissed with costs.

Coyajee, J. — I am of the same opinion.

Appeal dismissed.

★ 1925 BOMBAY 404

MACLEOD, C. J. AND COYAJEE, J.

Krishnarao Pandurang Barve—Appellant.

v.

Balvant Keshav Patil—Respondent.

Second Appeal No. 61 of 1924, Decided on 3rd March 1925, from the decision of the D. J. of Thana, in appeal No. 239 of 1922.

★ *Execution—Decree though binding on executing Court it can relieve a party against consequences of default.*

Although an executing Court cannot modify or vary the terms of a decree, it has power to relieve a party to a decree against the consequences of his default in not observing the obligations imposed upon him by a decree. [P 405 C 1]

G. N. Thakor and S. Y. Abhyankar—for Appellant.

P. B. Shingne.—for Respondent.

Macleod, C. J.—The plaintiff in this case obtained a decree in his favour in suit No. 28 of 1916. The following amended decree was passed by the appellate Court:—

"The decree of the lower Court is altered and it is ordered as follows:—The defendant should pay to the plaintiff the sum of Rs. 4,384-2-2 together with interest thereon by equal four annual instalments. The first instalment should be paid on the 5th of the month of June in the year 1919. Interest on each instalment should be paid at the rate of four per cent. from May 9, 1918, till payment of the whole amount. If he fails to pay the instalment, interest at the rate of six per cent. will continue to run from the dates on which the instalments will not be paid. The defendant should henceforth pay the Government assessment until delivery of possession to the plaintiff if occasion for such delivery to the plaintiff arises. If the plaintiff has paid the amount of Government assessment after May 8, 1918, the same should be recovered

by the plaintiff from the defendant together with interest thereon at six per cent. from the date of the payment of the Government assessment. If the plaintiff henceforth paid the Government assessment, he should recover the same with interest thereon to be calculated at the rate of six per cent. from the date of the payment of the Government assessment within one year. After all the instalments have been paid and after all the above-mentioned amounts have been paid, the plaintiff should pass a sale-deed to the defendant if the latter requests the former to do so. He should execute the sale-deed after the defendant brings to him the stamped paper required for the sale-deed of Rs. 3,180. If the defendant fails to pay the above-mentioned amounts within the period in which the last instalment is to be paid, the plaintiff is at liberty to claim back the possession of the property mentioned in the plaint. And the same is on the following condition:—The plaintiff is at liberty to claim the same if he pays before taking back the possession the amount which the defendant may have paid by way of principal out of Rs. 3,180."

The defendant paid Rs. 1,350 on March 11, 1921, and Rs. 1,061-4-2 on December 19, 1921. He made no further payment until after the presentation of the present *darkshast*, which the plaintiff took out on September 8, 1922, and with it he paid into Court Rs. 424-4-6 for payment to the defendant. He stated that since the defendant did not pay all the instalments within the date fixed for the last (fourth) instalment (June 1922) as directed by the decree, he was entitled to demand back possession of the suit property from the defendant on his recouping the defendant the amount paid by the defendant out of the principal sum of Rs. 3,180 in accordance with the terms of the decree.

The defendant thereafter deposited Rs. 3,158 into Court for payment to the plaintiff, and said that as that amount covered more than the amount due to the plaintiff under the decree the plaintiff might be paid the proper balance due to him under the decree out of the same, and his prayer for execution of the decree by recovery of possession of the property from the defendant should not be granted. The plaintiff's pleader admitted that calculated at six per cent. per annum interest the amount now due to

the plaintiff was Rs. 3,141-5-0, but he contended that since the defendant failed to pay off the instalments before the end of June 1922, the plaintiff was not bound to receive the said balance from the defendant, but was entitled to demand delivery of possession of the property under the terms of the decree.

The trial Judge held that the decree left full discretion to the Court whether to grant or not to grant on considerations of equity, the plaintiff's demand to recover possession of the property. In these circumstances he thought it would be inequitable to grant the plaintiff's prayer to recover possession of the property. The plaintiff lost nothing if he received his full principal amount and interest thereon at six per cent. from the defendant as directed in the decree. He, therefore, directed that out of the amount of Rs. 3,158 deposited by the defendant into Court Rs. 3,141-5-0 be paid to the plaintiff as full satisfaction of the balance due to him under the present decree. The plaintiff should also recover his costs of this *darkhast* from the defendant, the amount of Rs. 424-4-6, which had been deposited by the plaintiff into Court for payment to the defendant to be paid back to the plaintiff.

In appeal the acting District Judge agreed with the trial Court that as a Court of equity relief could be granted to the defendant against the consequences of his default, especially as he had since paid into Court the full balance that had become due to the plaintiff under the terms of the decree.

In appeal to this Court it has been argued that this Court has no power to relieve a party to a decree against the consequences of his default in not observing the obligations imposed upon him by the decree. It is suggested that by relieving against default, the Court executing the decree would be modifying or varying its terms. Now it cannot be disputed that an executing Court cannot modify or vary the terms of a decree. But it is going very much further to say that it has no power to relieve a party from the consequences of his not paying money within the exact time mentioned in the decree. To take one instance, a decree for redemption. Such a decree will state the amount payable by the mortgagor in order to redeem, and will give him a certain time within which to pay the amount. The

decree will provide that in default of payment of the money within that time, the mortgagee will be at liberty to apply for a final decree for foreclosure or sale. It cannot be contended for a moment that if the period fixed by the decree has passed, and the amount is not paid by the mortgagor, the Court, if the money is paid into Court after the period, cannot relieve him from the consequences of the default, and must grant the mortgagee a final decree for foreclosure or sale. So in this case the defendant undoubtedly was in default, and the plaintiff was entitled to come to Court and ask the Court to give him possession of the property. The Court then was entitled to weigh the equities and consider whether the defendant, as he had deposited everything that was due by him in Court, should be left in possession of the property, or whether the plaintiff should be entitled to refuse the offer of payment, and should be granted possession of the property itself. If the case had been argued on the footing that the equities were in favour of the plaintiff, we should have considered that the possibilities of the plaintiff's success would have been more favourable. But the plaintiff has gone too far in contending that the Court has no power whatever to consider the equities. We cannot agree with that. Both the lower Courts have considered the question whether the defendant is entitled to the indulgence he asked for. One consideration which evidently weighed with them was the fact that the property belonged originally to the defendant, and that the object of the decree was to enable him, if possible, to recover property which had passed away from him.

The next question would be whether the plaintiff was losing what he would otherwise have been entitled to in all fairness to him, if his prayer was not granted. But, as both Courts have found, the plaintiff was recovering the value of the property in full, he was getting interest at six per cent. thereon for the whole period, and was getting his costs of the *darkhast*. So really there is no particular reason why the Court should find that the balance of the equities was in his favour.

We think, therefore, that the decision of the Court below was right. The appeal must be dismissed with costs.

Appeal dismissed.

★ 1925 BOMBAY 406

MARTEN AND FAWCETT, JJ.

Kesarlal Girdharlal Desai and others—
Defendants—Appellants.

v.

*Jagubhai Hirallal and others—*Plaintiffs
—Respondents.

Cross Appeals Nos. 337 of 1922, and 67 of 1923, Decided on 25th August 1924, from the order of the Sub. J., Nadiad, in Darkhast No. 238 of 1920.

(a) *Civil P. C., O. 20, R. 18—Partition suit—Preliminary decree silent as to interest—Interest can be awarded in a proper case.*

Where in a partition suit, a preliminary decree is passed for partition and for taking accounts but the decree is silent as to interest, it is competent to the Court to award interest in a proper case. [P. 409, C. 1]

★ (b) *Civil P. C., S. 34—Decree for partition and for accounts—Section does not apply.*

Where the decree is not for a definite sum of money but is one for accounts and for partition it does not fall under S. 34 and sub-S. (2) does not apply. [P. 409, C. 1]

★ (c) *Hindu Law—Succession—Mayukha system—Sons of predeceased brothers take along with surviving brothers.*

Under the Mayukha system, the succession to the estate of a deceased person falls on the sons of his pre-deceased brothers along with his surviving brothers. [P. 409, C. 1]

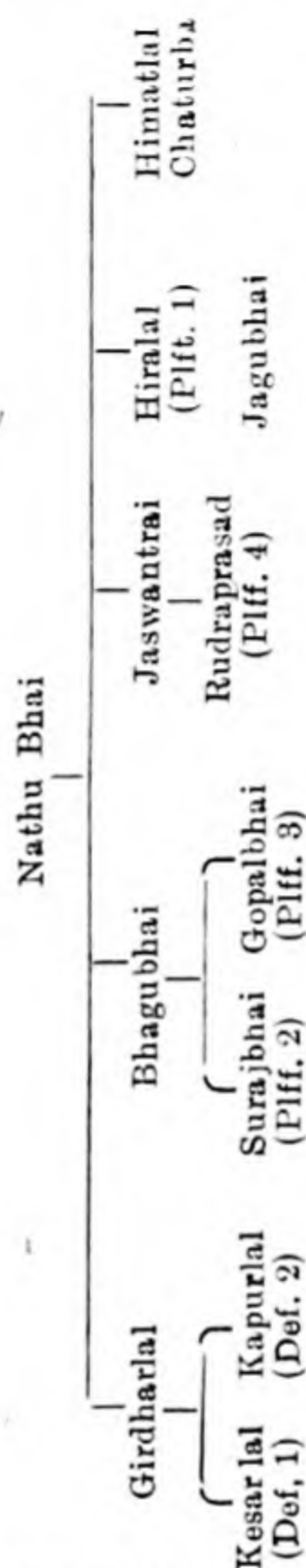
*G. S. Rao and H. V. Divatia—*for Appellants.

*M. H. Mehta, G. N. Thakore and N. K. Mehta—*for Respondents.

Facts.—The parties to the proceeding were related as shown in the geneological tree given below : [*vide* col. 2.]

A suit for partition of the family properties was instituted in 1893. A preliminary decree for partition ordering accounts to be taken from 1878 was passed by the trial Court in 1894. An appeal was made to the High Court and it resulted in accounts being ordered to be taken from 1870. Accounts were accordingly taken and in the year 1907 the Commissioner made his first report. At that time the defendants delivered certain lands to the plaintiffs. On the report coming before the Court it was directed by the High Court on appeal in 1909 that the accounts should be taken down to the year 1907. The accounts so ordered were made up and the report was submitted by the Commissioner in the year 1919 and in 1921 was made the final report by the Com-

missioner after reference to the Court. In the meanwhile on 16th October 1902 Himmatlal died. He bequeathed his property to his widow Chaturba by a



will dated 12th October 1902. On 6th March 1903 an application was made to the Court to bring Chaturba's name on the record as Himmatlal's legal representative. On 8th March 1905 Chaturba sold her one-fifth share in the estate to the defendants Nos. 1 and 2. She was brought on the record but on 14th September 1917 she died. On 8th March 1918 plaintiffs Nos. 2, 3 and 4 applied to the Court alleging that they and the defendants were the reversioners of Himmatlal. The trial Court after deciding the objections made to the Commissioner's report, confirmed the same. The sale deed in favour of defendants 1 and 2 was upheld and their title to Chaturba's share was recognised. With regard to the right to succeed to Chaturba's share of the profits of the

estate prior to the sale deed in favour of defendants 1 and 2 the parties were left to apply for a succession certificate. These were cross appeals to the High Court from the orders of the trial Court.

Marten, J.—[His lordship after discussing facts, referred to the contention that as a matter of law, interest could not be paid and proceeded as follows:—]

Mr. Rao cited to us several decisions of the Privy Council based on the law or the practice which was in force prior to the present practice and to the practice which regulated the decisions of the Court at the time when these proceedings were originally heard. I may note in passing that in one judgment their Lordships followed a particular rule, not because they themselves were in favour of it but because it represented practically the unanimous decisions of all the High Courts in India, and therefore in face of that unanimous opinion they were not prepared to set it aside, and declare that those decisions were all wrong. But in fact by alteration in the rules those decisions have been rendered obsolete.

Now we have not here a suit for possession of immovable property and for rent or mesne profits as in Order 20, rule 12. In that class of suits it is quite easy for a plaintiff to ask at the trial for interest when he gets his decree for possession. If he does not then ask for mesne profits, one can quite understand that he may be debarred thereafter from getting them. But the suit before us is governed partly by Order 20, rule 18, which provides for making preliminary decrees for the partition of property, and for giving such further directions as may be required. We are now on what I may call further consideration, and I think we may give such further directions as are necessary to work out the accounts and adjust the rights of the parties between themselves. What then about interest?

Now in the present case if it is open to us to award interest on this money, I should unhesitatingly do so having regard to the conduct of defendants Nos. 1 and 2 which the Commissioner has so adversely commented on and with which comments I entirely agree. I may also say that under the rule of *Damduput*, which admittedly applies here, the Hindu law has foreseen the

possibilities of what I have called the longevity of Indian litigation. The rule works very usefully here, because if one takes interest at the normal Court rate of 6 per cent. then after approximately $16\frac{2}{3}$ year's delay you reach your 100 per cent. and no more interest can be obtained by a plaintiff. So approximately if you take the date of October 1907 when the possession in this case was given and when this sum in question was due from the defendants, we have just about $16\frac{2}{3}$ years' interest up to the present date. Consequently as a matter of arithmetic it is sufficient to debit the defendants with interest on the sums found due from them as at October 1907 and to disregard complications as to the interest prior to that date. Even taking that date, they have got off some fourteen years' interest from the date of the suit, to say nothing about interest due prior to that date.

Therefore it seems to me—and I wish to make this distinction perfectly clear—that we should not debit the defendants with interest on the profits received by them year by year up to 1907, but should debit them with the final sum found due from them by the Commissioner at the proper date, *viz.*, 1907, and with interest thereon to the present date. In my opinion we have jurisdiction to do that in this case. In this connection I again want to point out the difference which exists between a case where a Court can only grant a preliminary decree, and a case in which the main rights can be ascertained at the trial. In *Daniell's Chancery Practice*, 7th Edn., Vol. I, p. 950, I find it stated:—

"A party may be charged with interest at the hearing upon further consideration, although the question has not been reserved by the original judgment; and not only may the computation of simple interest be so directed, but, where the Court finds large sums of money in the hands of an agent, receiver, trustee or personal representative, it may direct balances from time to time in the hands of the accounting party to be ascertained, and interest to be computed on them. The Court has even gone the length of charging an accounting party with interest on the balance in his hands on further consideration, not only where there was no reservation of the question of

interest by the original decree but even where there was not originally any claim that he might be so charged, and where the circumstances were such that a claim for interest existed, and was known to exist, at the time of the institution of the suit."

Then *Burland v. Earle* (1) was a Canadian appeal where the appellant had been ordered to repay money in excess of his salary as manager of the company. There Lord Davey in delivering the judgment of their Lordships said:—

"Their Lordships do not doubt the power of the Court on further directions to order payment of interest on a sum found due from a defendant, although the decree declaring the liability contains no direction for payment of interest or the statement of claim does not ask for it. In a case like the present one the plaintiffs are not entitled as of right to interest, and the liability for payment of interest is a matter for the discretion of the Court, and depends largely on the view which the Court may take as to the conduct of the defendant to be charged and the circumstances under which the liability for payment of the principal sum was incurred."

Then on going into the facts of that case, their Lordships were of opinion that as the Order in Council intentionally omitted to make an order as to interest, therefore the Court below had no discretion in that particular case to allow interest and consequently the claim for interest was overruled.

I may also refer to *In re. Salvin* (2) where Mr. Justice Eve went into the practice of allowing interest upon the arrears of an annuity, and after pointing out that there was a difference between an administration suit and a mortgage suit in that respect, he directed on further consideration that the arrears of an annuity should carry interest.

There is another line of authority which is exemplified in *Turner v. Burkinshaw* (3), where Lord Chelmsford pointed out that usually, unless fraud is proved, an agent is not charged with interest on the moneys in his hands, except from the date of the certificate. It will, however,

be remembered that in the present case the original report or certificate was in 1907, and that it is mainly by reason of the subsequent appellate judgment directing the accounts to be carried back still further, that defendants Nos. 1 and 2 have been enabled to delay the proceedings in this way.

Then there is a recent case of *Ramasamy Aiyar v. Subramania Aiyar* (4). This was a partition suit, which in the length of its proceedings was somewhat similar to the present one because it was instituted in 1895, and the learned Judges in the Madras High Court were deciding the question of interest in 1922. There the claim for interest was disallowed, and their Lordships referred to some of the English authorities. But there was this material difference of fact, which is pointed out by Mr. Justice Venkatasubba Rao. He says (p. 54):—

"As my learned brother has pointed out, it cannot be said in this case that the second defendant was bound to invest the profits. The plaintiff had the conduct of the suit and it was quite open to him at any moment to ask for possession of the properties, for an account of the profits and for payment to him of the sum ascertained to be due. The delay is not attributable solely to the second defendant, and the plaintiff has failed to show any grounds for making the second defendant liable for interest."

Here the plaintiffs got actual possession in 1907, but long before that, viz., in 1893, had asked for accounts and for payment of the sum due to them and also for interest. Therefore the Madras case seems to me quite a different one from the one which we have before us.

Accordingly, after giving my best consideration to the arguments which have been advanced, I hold, first, that in the circumstances of this particular case we have power to award interest; secondly, that it is a case in which if we have the power, undoubtedly interest ought to be allowed; and thirdly, that it ought to be awarded on the basis of interest due on the sums found due from defendants Nos. 1 and 2 as at October 1907, the date down to which the account has been ordered to be taken by the appellate Court.

(1) [1905] A. C. 590=74 L. J. P. C. 156=93 L. T. 313.

(2) [1912] 1 Ch. 33=81 L. J. Ch. 248=106 L. T. 85=56 S. J. 241=28 T. L. R. 190.

(3) [1867] 2 Ch. 488=15 W. R. 753.

(4) 1928 Mad. 147=46 Mad. 47=16 M. L. W. 297=43 M. L. J. 406.

The result, therefore, is that in effect, owing to the rule of *Damdapat*, we arrive at precisely the same sum as was awarded by the learned Judge, and I do not propose that the figures that he has given should in any way be altered. We think that the sum he has awarded is the correct sum, and that if there should be any slight variation in rupees or pies it should be adjusted so as to make the aggregate sum for interest amount to 100 per cent. Accordingly our finding is that the sum he has allowed is correct, although we allow it for different reasons.

Fawcett, J.—I agree generally with the conclusions of my learned brother, and the reasons that he has given for them.

I will only add a few remarks on one or two points. As to the question about interest awarded against the defendants, this is clearly not a case where a decree can be said to have been passed for the payment of money, that is to say, a definite sum of money, falling under S. 34 of the Civil Procedure Code, so as to make sub-S. (2) of the section applicable to the present case. I quite agree with my learned brother that there is no ground for holding that the decree passed originally by the Subordinate Judge in 1894, and the subsequent judgment of this Court in regard to that decree, are intentionally silent on this point of interest, so that such interest must be taken to have been refused. It seems to me to be a case clearly on all fours with the authorities cited by my learned brother, especially the Privy Council case of *Burland v. Earle* (1), where their Lordships held that the Court has the requisite authority to pass orders making interest payable by the defendant, although the decree declaring the liability contained no direction for payment of interest.

This case is one that arose under the old Code. The plaintiffs are seeking to execute the original decree which, amongst other things, directed an account to be taken of the income divisible between the plaintiffs and the defendants. And so far as regards the *Darkhast* of 1902 they asked for execution of that decree by having accounts taken. The case is one falling under S. 51 of the present Civil Procedure Code under which the Court may grant execution in such other manner as the nature of the relief granted may require. But the position really is analo-

gous to what the present Code recognises, namely, that a preliminary decree be first passed for the taking of an account, and then a final decree be passed when that account has been taken. The case would be entirely governed by O. 20, R. 18, of the present Code, under which the Court may give such further directions as may be required.

Now the case of taking an account under that particular rule is similar to the case of taking an account in a decree in an administration suit, and that is governed by O. 21, R. 30. We have for our guidance Forms Nos. 17 and 18 of the Appendix D to the Civil Procedure Code of decrees in the case of a preliminary decree in an administration suit, and a final decree in an administration suit by a legatee. If those forms are looked at, it will be seen that the legislature does recognise that although the preliminary decree does not contain any direction as to interest on the amount a defendant may be found accountable for, yet in the final decree interest may be awarded against him. In Form No. 17, item No. 7, there is a direction that the defendant should pay into Court all sums of money which may be found to have come to his hands, &c. There is nothing in the different heads of this Form which mentions the word "interest," and finally the Commissioner is directed to report the result of the enquiries and the accounts and all other acts ordered, and have his certificate ready for inspection of the parties on a certain date.

Then when we come to Form No. 18, head No. 1, we find the Form contemplating the Court making an order against a defendant not only as regards the amount certified by the Commissioner but also for the sum of Rs....for interest from a certain date to a certain date. I think that is a clear indication that the legislature intended to allow a subsequent order for the payment of interest of the kind referred to in the Privy Council case that I have already mentioned. The omission to mention interest in Form No. 17 does not appear to be due to oversight, because we find the word "interest" mentioned in the form of preliminary decree in an administration suit given in Form No. 19 : see item No. 3. The forms with regard to preliminary decree and final decree in suits for dissolution of partnership do not throw any light on this question, because the ordinary rule is that in taking

partnership accounts interest is not allowed from one partner to another.

The case is very much like one where the Court refers the matter to the Commissioner for taking an account, and the ordinary form on the Original Side says : "Further directions and further costs reserved." It does not make any specific direction about interest, but the further directions would cover any subsequent direction on that point.

[The points in Appeal No. 67 of 1923 which were not dealt with in the above judgments and Civil Application No. 523 of 1924 were dealt with in the judgments reported below.]

Marten, J.—We have already disposed, on July 29, of Appeal No. 337 of 1922 apart from the question of costs, and have also dealt with some of the points raised in Appeal No. 67 of 1923. We have since heard full arguments on the remaining points in Appeal No. 67 of 1923 and also Civil Application No. 523 of 1924.

Under the rulings of the Court already given, a one-fifth share in the income, the subject-matter of the accounts directed by the preliminary decree of 1894 as subsequently varied by the orders of the appellate Court, devolves on the original defendant No. 3, Himatlal, or his assigns or personal representatives. If one looks at the pedigree, it will be observed that Himatlal was one of five brothers, three of whom, *viz.*, Girdharlal, Bhagubhai and Jaswantrai predeceased him, and one, namely, Hiralal, the original plaintiff No. 1, survived him. It will also be seen that Himatlal died in 1902 leaving a widow Chaturba who died in September 1917. It is alleged that Himatlal left a will in favour of Chaturba under which she was his universal legatee and devisee, and that Chaturba in her turn passed a sale-deed in respect of this one-fifth share to defendants Nos. 1 and 2 dated March 8, 1905. It is common ground that this sale-deed only affected the income after March 8, 1905. Accordingly as the accounts directed by the Court extended from 1870 up to 1907 when possession of the land was given up by defendants Nos. 1 and 2, it follows that the sums found due in respect of this one-fifth share may have to be apportioned so that the amount up to March 8, 1905, passed to the representatives of Himatlal or Chaturba, and the amount accruing after

March 8, 1905, passes to the purchasers under the sale-deed of 1905.

[His Lordship held that the Court had jurisdiction to decide who were entitled to the one-fifth share and in what shares and proportions, and that the will and the sale-deed were valid, and proceeded as follows :—]

There yet remains the question whether Himatlal's nephews are entitled to share along with their uncle Hiralal, or whether Hiralal alone takes so much of Himatlal's one-fifth share as did not pass under the sale-deed, Exhibit 358. I have had the advantage of reading the judgment which my brother Fawcett has prepared on that point, and I need only say that I concur in it. Our final conclusions on these appeals will be stated after that judgment has been delivered.

Fawcett, J.—[His Lordship agreed with Marten, J. in upholding the findings of the lower Court as to the will of Himatlal (Exh. 357) and the sale-deed (Exh. 358) and continued as follows :—]

The dispute resolves itself into one whether under the law of succession contained in the Mayukha, which is the leading authority in the province of Gujarat, whence the parties come, the sole heir of Himatlal was Hiralal, his only surviving brother, or whether the nephews of Himatlal, plaintiffs Nos. 2, 3 and 4 defendants Nos. 1 and 2, who are the sons of predeceased brothers, are entitled to share along with Hiralal, as if their fathers had survived Himatlal. The son of the deceased plaintiff No. 1, namely Jagubhai, puts forward the former contention, while plaintiffs Nos. 2, 3 and 4 and defendants Nos. 1 and 2 contend that they are entitled, as nephews, to share in the succession.

It is common ground that, although it is now a question of the legal representation of Bai Chaturba who (as already mentioned), was brought on the record as the legal representative of Himatlal, the original defendant No. 3, this only entails a question of heirship to her husband Himatlal, for the marriage between Himatlal and Chaturba being presumably in an approved form, and Chaturba having died leaving no issue, her Stridhan inherited from her husband goes to his and not her, heirs. There is no dispute on this point. The sole question, therefore, before us is whether Himatlal was entitled to succeed to Chaturba's Stridhan

alone, or whether the nephews, being sons of predeceased brothers, are entitled to share along with plaintiff No. 1.

This question turns upon the meaning of paragraph 17 of S. 8 of Chapter IV of the Vyavahara Mayukha, and there is a dispute as to the correct translation of this paragraph. According to the translations of Messrs. Borrodaile and Stokes, the sons of brothers share the inheritance, without any restriction as to their father being alive at the death of their uncle, and the rule has accordingly been taken to be a general one that the sons of a deceased brother succeed along with the surviving brother or brothers. The translation, however, of the same passage made by Messrs. Mandlik, Jamietram and Gharpure, limits the right to the case where the father of any nephew was alive at the death of the paternal uncle, and allows such a nephew to take the share of his father on a division with the other paternal uncles.

Before us no expert evidence has been adduced as to which of these two translations is correct, nor has there been any detailed discussion on this point. In any case it would obviously be difficult for us, without a knowledge of Sanskrit, to decide which translation is to be preferred. I understand on good authority that the difference between the two translations turns upon whether an unexpressed negative should be read into one or two words, which are in this passage, and that Sanskrit allows a negative to be read in or the reverse, according to the context. There is, therefore, obviously room for legitimate difference of opinion as to the correct translation. In view of this it seems to me that in considering this question as it arises before us, we should be mainly governed by the principle laid down by the Privy Council in *The Collector of Madura v. Mootoo Ramalinga Sathupathy* (5) where their Lordships, after stating that the different commentaries had given rise to the different schools of law, say (p. 436) :—

"The duty, therefore, of an European Judge, who is under the obligation to administer Hindoo Law, is not so much to inquire whether a disputed doctrine is fairly deducible from the earliest authorities (Smritis), as to ascertain whether it has been received by the particular School

which governed the District with which he has to deal, and has there been sanctioned by usage. For, under the Hindoo system of law, clear proof of usage will outweigh the written text of the law."

Similarly in *Muthukaruppa Pillai v. Seethammal* (6), it is observed : It is not the literal meaning of the original text that has to be looked to in the administration of Hindu law. Though commentators may have been wrong in their interpretation of an original text, their opinion should be enforced as having the sanction of usage.

No doubt this principle has reference primarily to ancient commentaries : but in a case like the present I think it can almost equally be applied to usage based on an interpretation accepted by modern commentators. In the present case, we have the fact that undoubtedly for a long time it has been accepted as a rule laid down by the Mayukha that the sons of full brothers succeed with full brothers and in *Chandika Bakhsh v. Muna Kuar* (7) this was accepted as being a definite rule in cases governed by the Mayukha. It is true that the translation there referred to was Stokes', and that there was no discussion, and therefore no decision on the point now before us. On the other hand, the fact remains that this was taken as a definite rule, and the case affords a strong instance of usage. Practically all the modern commentators accept without any questioning this particular rule (see, for instance, Mayne's Hindu Law, 9th Ed. p. 834 ; Trevelyan's Hindu Law, 2nd Ed. p. 391 ; Mulla's Hindu Law, 4th Ed., p. 91 ; and even Gharpure's Hindu Law, 1921 Ed. p. 307). Again in *Haribhai v. Mathur* (8) Shah, J., who himself comes from Gujarat, treats the rule as unquestioned. Russell, J. in *Haridas v. Ranchordas* (9) also follows the interpretation of the rule accepted in the Privy Council case I have already mentioned. The construction which the learned Judge there gives to "the share of their father" in the translation that was furnished to him, is no doubt open to criticism ; but, on the other hand, this case affords a definite judicial recognition.

(6) [1915] 39 Mad. 298=16 M.L.T. 587=2 L.W. 38=26 I.C. 785=(1915) M.W.N. 48.

(7) [1902] 24 All. 273=29 I.A. 70=6 C.W.N. 425=4 Bom. L.R. 376=8 Sar. 233 (P.C.)

(8) 1924 Bom. 140=47 Bom. 940=25 Bom. L.R. 929.

(9) [1903] 5 Bom. L.R. 516.

(5) [1868] 12 M.I.A. 897=1 B.L.R. 1=10 W.R. 17=2 Suther 185=2 Sar. 861 (P.C.)

of the rule about all nephews sharing in the succession, and no subsequent case has been cited where this interpretation has been questioned.

The only commentators who appear to favour the view put forward by Mr. Ramdutt Desai for plaintiff No. 1 are Messrs. West and Majid, who in the 4th Edition of West and Buhler's Hindu Law, at page 104, limit the right of a nephew to succeed to the particular case of his father being alive when the succession opens, but dying before the partition of the estate takes place; and it is added that "Representation is not recognised in the case of a predeceased brother who has left sons. These nephews are excluded by their surviving uncles. It is only on the complete failure of brothers of the deceased that brothers' sons succeed to him." In a foot-note on the same page it is stated:—

"Some surprise may be felt that this rule should have seemed necessary. But according to Hindu notions, as possession is generally necessary to the completion of ownership, so separate possession is essential in theory to the completion of a separate ownership of a share derived from a prior joint ownership of the aggregate. The father, however, having once become a coparcener, his son has acquired a concurrent interest which is but expanded by the father's death."

Two cases are cited in support of this proposition, viz., *Burhum Deo Roy v. Punchoo Roy* (10) and *Chandika Bakhsh v. Muna Kuar* (7). With great respect, I cannot follow how these two cases really support it. I have referred to the report of *Burhum Deo Roy v. Punchoo Roy* (10) and the head-note of that case sufficiently shows the nature of the decision. It says "according to the Mitakshara Law, a step-brother inherits after the widows, if he survives them; otherwise a uterine brother's son succeeds." The Privy Council case of *Chandika Bakhsh v. Muna Kuar* (7) contains, so far as I can see, nothing on the subject. It merely assumes the existence of the rule, as I have already mentioned, that the sons of a brother who is dead share along with the surviving brothers. There is another thing which goes against their view. Among the replies of Shastries collected in West and Majid's Hindu Law at P. 492 will be found a case at Ahmednagar in

1859, where the question put to the Shastri and his answer were as follows:

Q.—A deceased woman has no sons or other near relations, but there are one brother-in-law, and four sons of another brother-in-law who are all united in interests. The question is: which of these will be her heirs.

A.—The brother-in-law and the sons of brother-in-law will all be her heirs.

This seems to show that in 1859 the Shastri who advised was following the Mayukha rule, as generally interpreted by modern commentators, and the Mayukha is in fact mentioned among the authorities given below the reply, for the Shastri can hardly have rested his opinion on the fact that the brother-in-law and the sons of the brother-in-law were united in interest, as this affords no basis either under the Mitakshara or the Mayukha for the sons of the other brother-in-law joining in the succession.

Ahmednagar is one of the places where the Mayukha is considered to be of equal authority with the Mitakshara but generally not capable of overruling it (see *The Collector of Madura v. Mootoo Ramalinga Sathupathy* (5), and *Bhagirthibai v. Karujirav* (11)). In the Ahmednagar Zilla, however, the Mayukha was then supposed to have a special authority, as mentioned by West J. in the case last cited, and this seems to account for the adoption of the Mayukha rule in this case. The learned authors Messrs. West and Majid have put a foot-note to this case that "the brother-in-law must have the preference as nearer by one degree," but the case shows the contrary interpretation of the rule is fairly old.

No doubt the rule is an exception to the general principle that the nearer *Sapinda* excludes the more remote, and the view of Messrs. West and Majid may be the correct one, but the exception seems to be so well established that, in the absence of something fairly conclusive to the contrary, I do not think we should hold that the accepted rule is erroneous, and decide in favour of the suggested restriction that the brother's sons' father must be alive when the deceased uncle died. The principle of *stare decisis* is clearly applicable to a question of the present kind which relates to property and title. Lord Lore-

(10) [1865] 2 W.R. 123.

(11) [1885] 11 Bom. 285 (F. B.)

burn in *West Ham Union v. Edmonton Union* (12) says :—

"Great importance is to be attached to old authorities, on the strength of which many transactions may have been adjusted and rights determined. But where they are plainly wrong, and specially where the subsequent course of judicial decisions has disclosed weakness in the reasoning on which they were based, and practical injustice in the consequences that must flow from them, I consider it is the duty of this House (of Lords) to overrule them, if it has not lost the right to do so by itself expressly affirming them."

But in the present case it has not been shown that the previous interpretation of this paragraph 17 in the *Mayukha* is plainly wrong or that any of the other considerations mentioned by his Lordship applies.

Therefore I would answer the question by holding that the nephews, namely plaintiffs Nos. 2, 3 and 4 and defendants Nos. 1 and 2, are entitled to be treated as the legal representatives of Bai Chaturba, and to share in the estate of the deceased Himatlal, which is now in question, along with plaintiff No. 1.

(12) [1908] A. C. 1=77 L. J. K. B. 85=98 L. T. 1=72 J. P. 9=6 L. G. R. 39=52 S. J. 75=24 T. L. R. 103.

1925 BOMBAY 413

MACLEOD, C. J. AND COYAJEE, J.

Shrinivas Narayan Prabhu—Appellant.

v.

Shiddika Maidin Saiba and others—Respondents.

Second Appeal No. 62 of 1924, Decided on 20th March 1925, from the decision of the District Judge of Karwar, in Appeal No. 48 of 1923.

Civil P. C., O. 21, R. 68—Mortgage of property—Money decree was passed against mortgagor's vendor and the property was sold—Auction purchaser was obstructed in taking possession, by mortgagee—No adverse order in claim proceedings passed against mortgagor—Mortgage is valid.

Auction purchaser of a property under a money decree cannot succeed in an action for possession against a mortgagee of that property from a vendee from the judgment debtor under the

money decree when the sale had taken place prior to the auction purchase. The mortgage of the property is valid and enforceable in absence of evidence that the mortgagor was affected by any adverse order under Order 21, Rule 63.

Nilkanth Atmaram—for Appellant.

G. P. Murdeshwar—for Respondents.

Macleod, C. J.—The property in suit originally belonged to one Dev Naik. He sold it on October 14, 1902, to defendant No. 1. In the meantime the father of the present fifth defendant had brought a suit against Dev Naik and obtained a money decree, in execution of which the suit property was sold by the Court and was purchased by one Mallappa in 1905. On June 15, 1909, defendant No. 1 mortgaged the property to the plaintiff. When Mallappa attempted to take possession of the property which he had purchased at the Court-sale, he was obstructed by the first defendant. On July 1, 1909, Mallappa filed a suit to recover possession. On these bare facts it is clear that the plaintiff had a good title for his mortgage against the auction purchaser. It is suggested now that there had been an order by the Court on a claim presented under Order 21, Civil Procedure Code, by Mallappa. If proceedings had actually been taken under Order 21, and an order had been made in favour of defendant No. 1, that would not be conclusive if Mallappa had filed a suit within one year from the date of the order, and Mallappa would be entitled to prosecute his suit against not only defendant No. 1 but any one deriving title, after the order had been made, from defendant No. 1. That was decided in *Krishnappa Chetty v. Abdul Khader Sahib* (1). But in this case we are not informed that any order had been made which would prevent defendant No. 1 from disposing of the property pending the decision of any suit that Mallappa might file to establish his title. That being so, the District Judge was right in holding that the plaintiff was entitled to a decree on his mortgage. The appeal is dismissed with costs.

Appeal dismissed.

(1) [1913] 38 Mad. 535=25 I. O. 11=26 M. L. J. 449.

1925 BOMBAY 414

MACLEOD, C. J. AND COYAJEE, J.

Jagannath Nathu and others—Defendants—Appellants.

v.

Ichharam Naroba Vani—Plaintiff—Respondent.

First Appeal No. 116 of 1924, Decided on 13th February 1925, from the decision of the 1st Class Sub. J., Jalgaon, in Darkhast No. 805 of 1923.

Limitation Act, Art. 182—Application for execution to a Court before the property of the defendant passed under jurisdiction of another Court, is step-in-aid—Procedure after transfer of property indicated.

A decree was being executed in the Court of S. J., at Dhulia against two defendants both of whom had properties within the jurisdiction of the Court. During the pendency of the execution proceedings, the property of defendant No. 2 passed under the jurisdiction of the Jalgaon Court.

Held: on the question of limitation for an execution application made to the Jalgaon Court that the original application to the Dhulia Court was a step-in-aid of execution but the proper order for the Dhulia Court to make was to transfer the decree or a certified copy thereof so far as it concerned the defendant No. 2 to the Jalgaon Court. 42 Mad. 821 (F. B.) *Foll.*

D. C. Virkar—for Appellants.

V. D. Limaye—for Respondent.

Macleod, C. J.—A consent decree was passed in this case on March 18, 1912, by the First Class Subordinate Court at Dhulia against two defendants separately, each being made liable for Rs. 6,500 payable by annual instalments of Rs. 650 each together with interest due commencing from November 1, 1912. The decree charged the properties of the two defendants separately. The decree against the first defendant is being executed in Dhulia, as his property is in that Court's jurisdiction. The property of the second defendant at the time of the decree was passed was also within the jurisdiction of the Dhulia Court. On June 9, 1920, the Jalgaon Court was made a First Class Court, and as the second defendant's property was within the jurisdiction of that Court, a question arose with regard to the further execution of the decree against him. The darkhast of 1921 was filed against both the defendants in the Dhulia Court. On February 22, 1922, the Dhulia Court held that as far as the second defendant was concerned it had

no jurisdiction as the properties of defendant No. 2 were not in that Court's jurisdiction. The plaintiff then presented a darkhast to the Jalgaon Court on August 14, 1923.

The second defendant contended that the darkhast of 1921 was not a proper step-in-aid of execution, not being made to the proper Court. The First Class Subordinate Judge, following the Full Bench decision in *Seeni Nadan v. Muthuswamy Pillai* (1), held that the application to the Dhulia Court which passed the decree originally, even after the territorial jurisdiction was transferred to the Jalgaon Court, would be a proper step-in-aid. He, therefore, held that the darkhast filed in his Court was in time. The Madras decision relied upon by the First Class Subordinate Judge is directly in point. The matter there was fully argued, and we see no reason why we should dissent from the view taken by the learned Judges on the question of the construction of Ss. 37 and 38 of the Code taken together with S. 150. The Dhulia Court was the Court which passed the decree, and after certain territories within its jurisdiction had been transferred to the Court at Jalgaon, then under the provisions of S. 37 the Jalgaon Court would be deemed to be the Court which passed the decree. It does not follow that the Dhulia Court ceased to be the Court which passed the decree so as to make an application for execution made to it an application to a Court which was not the proper Court. As the decree itself must have been lying in the Dhulia Court, we should have thought that the proper order to be made on the darkhast of 1921 was to transfer the decree or a certified copy thereof so far as it concerned the second defendant to the Jalgaon Court. In any event we think the Judge was right in holding that the darkhast was in time. The appeal, therefore, must be dismissed with costs.

Appeal dismissed.

(1) [1919] 42 Mad. 821=37 M. L. J. 284=26 M. L. T. 223=11 L. W. 63=58 I. C. 213=(1919) M. W. N. 640. (F. B.)

1925 BOMBAY 415

MACLEOD, C. J. AND COYAJEE, J.

Peruri Suryanarayanan—Appellant.

v.

W. L. Narsimha—Opponent.

Civil Extraordinary Application No. 243 of 1924, Decided on 19th March, 1925.

(a) *Presidency Small Cause Courts Act, S. 41—Sub-tenant is an occupant.*

A Sub-tenant is an "occupant" according to the meaning of the word in S. 41.

(b) *Bombay Rent (War Restrictions) Act (1918), S. 2—Sub-tenant let in without landlord's consent is not a "tenant" with respect to original landlord.*

If a tenant sub-lets premises, he becomes a landlord with regard to his own tenant. But his tenant does not come in contact with the original landlord unless there has been an assignment by which the rights and liabilities of the original tenant have been transferred to his sub-tenant, so that privity of contract arises between the landlord and the sub-tenant. Consequently the sub-tenant is only a tenant under the Rent Act with regard to his own immediate landlord, and when the owner of the premises seeks to evict his own tenant, he cannot be opposed by the person who has been put in possession without his consent by his tenant. [P 415 C 2]

A. G. Sathaye—for Applicant.*T. N. Walavalkar*—for the Opponent.

Macleod, C. J.—This is a suit filed by the plaintiffs under Chapter VII of the Presidency Small Cause Courts Act to recover possession of their premises on the ground that they required them *bona fide* and reasonably for their own use. The premises were let by the plaintiffs to the first defendant, and the first defendant in his turn sub-let a portion of them to the second defendant. The first defendant did not contest the plaintiffs' claim and had vacated the premises in his occupation. The second defendant contested the plaintiffs' right to turn him out. The Judge appears to have dealt with the case as if there was privity of contract between the plaintiff and the second defendant, and dismissed the suit. We must consider, therefore, what is the position of a landlord when he finds himself confronted by a person in occupation holding through his own tenant.

Apart from any other question, it is contended that if the landlord sought to eject such a person, the suit would not come under Chapter VII of the Presidency Small Cause Courts Act, so that the plaintiff would have to file his suit in the High Court. But we think that such a

person would be an "occupant" according to the meaning of the word in S. 41 of the Act, and it would certainly seem unreasonable that a tenant might defeat his landlord's right of having recourse to the Presidency Small Cause Courts Act, S. 41, by giving possession to a third party. Clearly, the third party becomes an occupant, and the Small Cause Court has jurisdiction to give the landlord or owner of the premises possession against such an occupant. But although such a person may be an occupant as against the owner or the landlord, it does not follow that he is a tenant within the definition of that term in S. 2 of the Bombay Rent Act. Under S. 2 (d) the expression "tenant means any person by whom or on whose account rent is payable for any premises and includes every person from time to time deriving title under a tenant; while the expression "landlord" means under S. 2 (c) any person for the time being entitled to receive rent in respect of any premises whether on his own account or on account or on behalf or for the benefit of any other person; it includes a tenant who sub-lets any premises and every person from time to time deriving title under a landlord. Therefore, if a tenant sub-lets premises, he becomes a landlord with regard to his own tenant. But his tenant does not come in contact with the original landlord unless there has been an assignment by which the rights and liabilities of the original tenant have been transferred to his sub-tenant, so that privity of contract arises between the landlord and the sub-tenant. Consequently the sub-tenant is only a tenant under the Rent Act with regard to his own immediate landlord, and when the owner of the premises seeks to evict his own tenant, he cannot be opposed by the person who has been put in possession without his consent by his tenant. We think, then, that the second defendant had no right to resist the plaintiff's claim for possession of the premises. He could have resisted the claim of his own immediate landlord to eject him within the limits allowed him under the provisions of the Rent Act, but as soon as the tenancy between the plaintiff and the first defendant came to an end by the first defendant surrendering possession, then the plaintiff was entitled to possession from the second defendant who had been

put in possession by the first defendant. If that were not the legal position of the parties the result would be that a tenant could always postpone his landlord's rights if established to recover possession, by sub-letting the premises to a third party, and the landlord's right to get possession of the premises might be indefinitely postponed by a series of sub-lettings. We think the rule must be made absolute and the suit decreed against the second defendant also with costs in the trial Court and in this Court.

Rule made absolute.

★ 1925 BOMBAY 416

MACLEOD, C. J. AND COYAJEE, J.

Shripad Gopalakrishna Chandavarkar
—Plaintiff—Appellant.

v.

Basappa Rudrappa Dandi and others
—Respondents—Defendants.

Second Appeal No. 184 of 1924, Decided on 9th April 1925, from the decision of the Assistant Judge, Belgaum, in Appeal No. 239 of 1921.

★ *Hindu Law—Joint family—Father becoming insolvent—Father's power to alienate family property for just purposes does not vest in official assignee.*

When the manager of a joint Hindu family is adjudicated insolvent, the power which he had before his insolvency to dispose of family estate for proper purposes, cannot be considered as vesting in the receiver or Official Assignee. 1925 P. C. 18. Foll. [P. 416, C. 2]

G. P. Murdeshvar—for Appellant.

D. R. Manerikar—for Respondents.

Macleod, C. J.—The plaintiff sued for a declaration that the suit property was not liable for the satisfaction of the decree obtained by defendant No. 1 against defendant No. 2 in Suit No. 564 of 1914 in the Court of the Subordinate Judge at Bagalkot on November 1, 1915. The first defendant had obtained a decree against the second defendant and his father, who was adjudicated an insolvent on November 10, 1916, in the Court of the Subordinate Judge, Belgaum. The plaintiff was a receiver of the estate of the insolvent father of defendant No. 2. The suit property had been attached before judgment in Suit No. 564 on December 20, 1914. After succeeding in the suit defendant No. 1 filed *darkhast*

No. 271 of 1916 in the Court of the Subordinate Judge at Belgaum, on June 29, 1916, and the property in suit was again attached by that Court. When the second defendant's father was adjudicated insolvent, the attachment on his interest of the property would have to be released, and his interest in the property would vest in the receiver. In the last decision on the point (*Sat Narain v. Behari Lal*) (1), it was held by the Privy Council that—

"Upon a Hindu being adjudicated an insolvent under the Presidency-towns Insolvency Act, 1909, the property of the joint Hindu family consisting of himself and his two sons does not thereby become vested in the official assignee, although under S. 52, sub-S. 2, of the Act, or in some other way, that property may be made available for the payment of his just debts."

So that the interest of the second defendant would not vest in the receiver on the insolvency of his father, and the plaintiff in order to get the declaration he asked for had to contend that the right of the father of a joint Hindu family to dispose of family property for legal necessity had become vested in him. Speaking for myself, I do not think that when the manager of a joint Hindu family is adjudicated insolvent, the power which he had before his insolvency to dispose of family estate for proper purposes, must be considered as vesting in the receiver or Official Assignee. The first defendant, therefore, is entitled to execute his decree against the solvent son irrespective of the rights which were vested in the receiver with regard to the interest of the second defendant's father.

The appeal is dismissed with costs.

Coyajee, J.—I concur in holding, on the facts of this case, that the decree of the lower appellate Court is right.

Appeal dismissed.

(1) 1925 P. C. 18=6 *Lah* 1=52 I, A. 22=47
M. L. J. 857=(1925) M. W. N. 1=29
A. L. J. 85=6 L. R. P. C. 1=21 M. L. W.
375=27 Bom. L. R. 135=29 C. W. N.
797 (P. C.)

1925 BOMBAY 417

MACLEOD, C. J. AND COYAJEE, J.

Vishvanath Bhiva Raul—Appellant.

v.

Turkaram Vithu and others—Respondents.

Second Appeal No. 273 of 1924, Decided on 19th February 1925, from the decision of the Assistant Judge, Poona, in Appeal No. 198 of 1922.

Limitation Act, Arts. 134, and 148—Transferee from mortgage with constructive notice cannot rely on Art. 134.

Art. 134 does not apply to a suit by a mortgagor to recover possession of the mortgaged property from an alienee of the mortgagee who had even constructive notice of the mortgage. Such a suit is governed by Art. 148 of the Act. 44 Bom. 614 Foll. [P 417 C 2]

G. N. Thakor and K. V. Joshi—for Appellant.

W. B. Pradhan—for Respondents.

Macleod, C. J.—The plaintiff sued to redeem and recover possession of the plaint land from the defendant. The plaintiff claimed through one Chimabai, who mortgaged the suit property to one Ganu for Rs. 75 on June 2, 1896, with possession. On May 5, 1902, Ganu assigned his mortgage rights to one Yamunabai kom Laxman for Rs. 125. Yamunabai sold the property on July 7, 1906, to one Shankar Laxman for Rs. 300. The document purported to be a sale deed, but contained this clause: "I have given in your custody for keeping them with you, the documents that I have regarding the said house." Those documents included the assignment of the mortgage rights given by Ganu to Yamunabai. Shankar, therefore, knew that the owner was only a mortgagee. On September 21, 1907, Shankar sold the plaint property to the present defendant for Rs. 400. That document contained the following clause: "The said property was in the *vahivat* of Yamunabai by right of the assignment deed of May 6, 1902. She sold it to me for Rs. 300 on July 7, 1906, and passed to me a registered sale deed for it. Before that, Yamunabai was in *vahivat* of the said property. Since we purchased it from her it was in our *vahivat* and we have sold it to you." At the end of the document it is stated as follows: "I have given into your custody for keeping them the assignment deed of the said house, the possessory mortgage deed and the sale deed passed by Yamunabai".

The defendant sought the protection of Art. 134 of the Indian Limitation Act. The trial Court said:—

"Where the transferor is a mortgagee and the transferee has notice of that fact in such a case Art. 134 has no application at all and the suit against the transferee would come within Art. 148 (see *Tairamiyar v. Shihelishib*: 22 Bom. L. R. 802) '[When a transferee for value from a mortgagee seeks the protection of Art. 134, he must be] a person who purchases that which is *de facto* a mortgage upon the representation made to him and in the belief that it is [not a mortgage but] an absolute [sale] title.'"

Those are the words of Sir Charles Sargent in *Pandu v. Vithu* (2). The Judge continued:—

"In other words he must have reasonable grounds for believing, and must believe, that his alienor had the power to convey an absolute interest and not merely the interest of a mortgagee."

Accordingly the Judge passed a redemption decree in favour of the plaintiff. In appeal the Judge said:—

"I am unable to concur in the opinion of the Second Class Subordinate Judge that Art. 134 does not apply where the transferee has notice that his transfer of title is that of a mortgagee and not of an owner."

He relied upon the decision in *Yesa Ramji v. Balkrishna Lakshman* (1); but that case was considered in *Pandu v. Vithu* (2). In *Keshav v. Gafurkhan* (3), also referred to by the Judge, the purchaser only became aware five or six months after his purchase that his transferor was a mortgagee, and the judgment of the High Court must be considered with regard to that fact. As the Judge considered that the defendant had acquired a complete title to the house in suit under Art. 134, and the plaintiff had no right to redeem, the plaintiff's suit was dismissed with costs.

We think on the facts of this case, and especially on the finding of the appellate Judge, that the defendant had constructive notice of the previous transactions relating to the plaint house, that he cannot take advantage of the provisions of Art. 134 of the Indian Limitation Act.

(1) [1891] 15 Bom. 583.

(2) [1895] 19 Bom. 140.

(3) 1922 Bom. 234=46 Bom. 903=24 Bom. L. R. 319.

We think the proper view to take of this case is, that, in spite of the sale deed, first Shankar and then defendant, were transferees of the mortgagee's rights. In that case the decision of this Court in *Tairamiya v. Shibalisaheb* (4) will apply and the plaintiff will be entitled to redeem the property from the possession of the defendant.

We, therefore, allow the appeal and restore the decree of the trial Court. Six months are allowed to the plaintiff for redemption, to run from the time the proceedings reach the trial Court.

The plaintiff will be entitled to his costs in this Court and in the Court below.

Appeal allowed.

(4) [1920] 44 Bom. 614=57 I. C. 568=22 Bom. L. R. 802.

★ 1925 BOMBAY 418

MACLEOD, C. J. AND COYAJEE, J.

Abdul Aziz Sheikh—Plaintiff—Applicant.
v.

Chandu Sonu Khodke—Defendant—Opponent.

C. E. A. No. 274 of 1924, Decided on the 13th February 1925, against an order of the Judge of the Court of Small Causes at Poona, is Suit No. 4,241 of 1923.

★ (a) *Civil P. C., S. 11*—Application to file award registered as suit, abated for non-joinder of representatives—Second Suit to recover money due is not barred.

Where a person makes an application to file an award, and it is registered as a suit, but the suit abated for plaintiff's failure to join deceased defendant's representatives, a second suit to recover the money due under the award is not barred *res judicata*. 45 Bom. 329 App. [P 418, C 2]

★ (b) *Civil P. C., O. 7 R. 10*—Plaint returned for presentation to proper Court—Plaintiff appealing—Appeal dismissed—Plaintiff can then present it to proper Court.

Where a plaint has been returned for presentation to the proper Court, and the plaintiff appeals against the order, he is still at liberty to present the plaint to the proper Court subject to the bar of limitation. [P 418, C 2]

(c) *Civil P. C., 2nd Sch. Art. 20*—Suit to enforce award is maintainable though no order for filing the award is obtained.

A suit can be filed to enforce an award without the plaintiff first obtaining an order that the award itself shall be filed. The validity of the award can be assailed in that suit. [P 419 C1]

J. R. Gharpure—for Applicant.

P. V. Kane—for Opponent.

Macleod, C. J.—In *Rajmal Girdharmal v. Maruti Shivram* (1), it was held that when a party to an award sought to file it in Court under paragraph 20 of the second Schedule of the Civil Procedure Code, and the Court refused to file it, such refusal would not operate as a bar of *res judicata* if the party filed a regular suit thereafter to enforce the award. In this case the applicant sought to file an award passed in his favour dated September 17, 1918. The application was registered as a suit. But thereafter the defendant died and his legal representatives were not brought on the record within the prescribed period. An order for abatement was then passed. The applicant then brought a suit in the First class Subordinate Judge's Court to recover the money under the award, but the plaint was returned by the Joint Subordinate Judge as being beyond his jurisdiction and was presented to the Small Cause Court. The plaintiff, however, thought he would prefer an appeal to the District Judge against the decision of the Joint Judge returning the plaint. So he got back his plaint, but he lost the appeal, and again presented the plaint to the Small Cause Court. The Judge considered that the suit was barred under Order 22, rule 9, considering that the decision in *Rajmal Girdharmal v. Maruti Shivram* (1) was not applicable, and that although an order rejecting an application to file an award would not be considered as a decree yet an order of abatement in a similar proceeding would bar a regular suit being filed to enforce the award. We cannot see any difference between the two. An order that an application to file an award abates is in the same category as an order refusing to file an award. So neither order can operate as *res judicata*. We further think that the Judge was wrong in holding that the suit was not maintainable because the plaintiff ought to have adopted a different procedure after the District Court had confirmed the order of the Subordinate Judge. He would be entitled, in any event, after his plaint was returned to him, to file it again in the same Court, subject to any bar there might be of limitation. The Judge also thought that the suit was misconceived as the plaintiff was trying to recover the amount awarded without a

(1) [1921] 45 Bom. 249=59 I. C. 755=22 Bom. L. R. 1377.

decree on the award, and the question whether the award was validly passed or not could not be tried in such a suit. But a suit can be filed to enforce an award without the plaintiff first obtaining an order that the award itself shall be filed. In such a suit there does not appear any reason why the validity of the award could not be assailed. We make the rule absolute and direct that the suit should be heard on its merits by the Small Cause Court Judge. Costs to be costs in the cause.

Rule made absolute.

1925 BOMBAY 419

MACLEOD, C. J. AND CRUMP, J.

Kalyan Municipality—Defendant—Appellant.

v.

Govind Karsan Ramji—Plaintiff—Respondent.

Second Appeal No. 258 of 1923, Decided on 16th December 1924, against the decision of Joint Judge, Thana, in Appeal No. 162 of 1921.

(a) *Provincial Small Causes Courts Act (1887), Sch. II, Art. 35 (j)—Claim for refund of tax illegally recovered with interest as damage—Suit is not cognisable by Small Cause Court.*

A claim to amount taxed and illegally recovered by the municipality is a suit triable by the Small Cause Court. But if the plaintiff asks also for interest on that sum that is claimable only as damages or compensation for the amount having been illegally recovered from him, and the jurisdiction of the Small Causes Court becomes barred under Art. 35 (j). [P 419 C 2]

(b) *Bombay Dt. Municipal Act (III of 1901), S. 65 (1)—Levy of Sanitary cess under S. 59 (vii)—No notice under S. 65 (1) issued—Levy is not illegal.*

The levy of general sanitary cess by a Dt. Municipality under S. 59 (vii) of the Act is not illegal on the ground of want of notice under S. 65 (1). [P 419 C 2]

P. B. Shingne—for Appellant

A. G. Desai—for Respondent.

Macleod, C. J.—This is a suit by the plaintiff for the recovery of Rs. 363-0-1 levied from him by the Municipality of Kalyan for general sanitary cess and shop-tax in regard to the property situated within the Kalyan Municipal area. The plaintiff's contention was that the recovery was illegal inasmuch as he was not given the notice required by S. 65 (1) of the District Municipal Act, and because

the Municipality did not observe the procedure prescribed by Ss. 59 to 65 of the Act in regard to the imposition of these taxes.

A preliminary point has been taken that no appeal lies, the suit being of a Small Causes Court nature. If the plaintiff had confined his claim to the amount taxed and illegally recovered from him, then it would have been a suit triable by the Small Causes Court and consequently there would be no second appeal. But the plaintiff asked for interest on that sum, and that could only have been awarded as damages or compensation for the amount having been illegally recovered from him. Consequently the jurisdiction of the Small Causes Court would be barred under Article 35 (j) of the Second schedule and a second appeal lies.

We are not concerned in this appeal with the amount of the claim which relates to the shop-tax, as it is admitted that the levy of the increase in shop-tax was illegal for want of sanction of the Governor-in-Council, so we are only concerned with the amount levied for the general sanitary cess. Both the lower Courts have held that that levy was illegal on the ground of want of notice under S. 65 (1) of the District Municipal Act. The only thing that can be said for the respondent's argument is that it has found favour with the judges in the lower Courts. It is perfectly obvious that the plaintiff misread S. 65 (1) and has confused taxation with assessment. The Municipality were not assessing plaintiff's property for the first time nor were they increasing the assessment. Therefore no notice was required to be given to the plaintiff under that section. They were levying the tax under S. 59 (vii) :—"A general sanitary cess for the construction or maintenance, or both construction and maintenance, of public latrines, and for the removal and disposal of refuse". Proviso (c) says such a tax can be levied as a rate on buildings. The Municipality can impose separately any two or more of the taxes described in clauses (i), (vii), (viii), and (ix), or they may impose a consolidated tax assessed as a rate on buildings or lands. The fact remains that they were empowered to impose a general sanitary cess, they did so by resolving that a rate of three per cent. on the letting values of buildings should be levied for that purpose. It is not suggested that the proper

measures were not taken in order to validate the imposition of the tax.

I cannot, therefore, agree with the lower Courts that the levy of this tax was illegal on the ground of want of notice under S. 65 (1) of the Act. Therefore the appeal must be allowed.

There will only be a decree for the amount of the shop-taxes admittedly not properly exacted from the plaintiff.

Each party to bear its own costs throughout.

Crump. J.—I agree.

Appeal allowed.

1925 BOMBAY 420

MACLEOD, C. J. AND COYAJEE, J.

Deekappa Malappa Hubli—Appellant.

v.

Chanbasappa Rachappa Neeli—Respondent.

First Appeal No. 344 of 1923, Decided on the 13th February 1925, from the decision of the First Class Sub. J. Dharwar, in Darkhast No. 123 of 1923.

Civil P. C., S. 63 — Execution of decree — Attachment of property by First Class Subordinate Judge—Subsequent attachment and sale by Second Class Subordinate Judge—First Class Subordinate Judge is entitled to call for sale proceeds to his Court for rateable distribution.

Where a property is attached and a decree passed against its owner by the Court of a higher grade, but the property is sold by a Court of lower grade in execution of a decree passed subsequently in that Court, the Court of higher grade is entitled, under S. 63 to ask that the sale proceeds as well as the execution proceedings be transferred to its Court, for rateable distribution among the decree-holders who have qualified themselves under S. 73 of the Civil P. Code. 46 Cal. 64 Foll. 18 Bom. 458 *expl.*

[P 422, C. 1, 2.]

Nilkant Atmaram—for Appellant.

A. G. Desai and *S. B. Jathar* — for Respondent.

Macleod, C. J.—The appellant in this case obtained a decree on January 23, 1923, in Suit No. 201 of 1921 in the Court of the First Class Subordinate Judge of Dharwar against one Chanbasappa Rachappa, respondent No. 1. He had obtained an attachment before judgment on certain properties of the respondent on July 12, 1922. This attachment was confirmed by the decree. Other creditors of the respondent had obtained decrees against him in the Court of the

Second Class Subordinate Judge at Hubli. The present opponent No. 2 obtained a decree in the Hubli Court on June 23, 1922, and attached certain of the respondents' property on June 29, 1922. That property was sold in execution by the Hubli Court on March 16, 1923. Opponent No. 3 obtained a decree in the Hubli Court on July 9, 1922, and in execution of that decree certain other property of the respondent was sold on July 14, 1923. All the properties sold in execution of these two decrees had been already attached before judgment in the Suit No. 201 of 1921.

It will be seen, therefore, that in spite of the attachment having been levied on the respondents' property by the First Class Subordinate Judge's Court, the properties were sold in execution of decrees of the Second Class Subordinate Judge's Court, and the sale proceeds were lying in that Court. The present appellant made an application to the First Class Subordinate Judge of Dharwar that the sale proceeds should be sent for from the Second Class Subordinate Judge's Court. The Judge first made an order that the sale proceeds should be sent to his Court, and the claimants were referred to S. 63, Civil Procedure Code, to have their claims settled. The same day he appears to have withdrawn that order and told the applicant that he should move the District Judge for the transfer of the sale proceeds to the First Class Subordinate Judge's Court, referring to the decision in *Patel Naranji Morarji v. Haridas Navalram* (1). In that case some property had been first attached in execution of a decree of the Second Class Subordinate Judge of Surat and was thereafter attached in execution of a decree of the First Class Subordinate Judge. The Second Class Subordinate Judge's Court sold the property, and the holder of the decree passed by the First Class Subordinate Judge then applied to the Second Class Subordinate Judge to set aside the sale on the ground that it was invalid under S. 285 of the Code of 1882, as having been made while the attachment levied by the First Class Subordinate Judge was pending, and on the Second Class Subordinate Judge's refusal to do so, he applied to the High Court under its extraordinary jurisdiction. It was held that the sale was good, and that the applicant

(1) [1894] 18 Bom. 458.

had no right to ask the Second Class Subordinate Judge to set aside the sale as made without jurisdiction, although possibly he might have applied to the District Judge to transfer the proceeds realized by the sale to the First Class Subordinate Judge's Court.

The section of the Code of 1908 corresponding to S. 285 of the Code of 1882 is S. 63 (1). Sub-S. (2) of that section has been added probably in consequence of the decision which I have just referred. It runs as follows:—'Nothing in this section shall be deemed to invalidate any proceeding taken by a Court executing one of such decrees.'

The appellant then applied to the District Court, but the District Judge considered there was nothing in the Civil Procedure Code to authorise a District Court to order the transfer of these sale proceeds, although he referred to the decision in *Nilkanta Rai v. Gosto Behari Chatterjee* (2). He further considered that it seemed to him better that the proceedings which had been begun in the Court at Hubli should continue to an end, and that when that end had been reached, those parties, if any, who might be aggrieved by the outcome, should seek such remedy as they might be able to find in the Code of Civil Procedure.

The appellant then filed this appeal under S. 47 of the Code against the decision of the Subordinate Judge. Although it is not clear on the record what the Subordinate Judge decided, it may be taken that he refused to accede to the appellant's application to send for the sale proceeds from the Hubli Court, and advised him to move the District Judge. The appellant has made respondents to the appeal not only the original judgment-debtor, but also the two decree-holders under the decrees I have referred to in the Hubli Court. An objection has been taken by them that no appeal lies, and we consider that there was considerable justification for that contention. But we can entertain the appeal as if it had originally taken the form of an application under our extraordinary jurisdiction, as we consider that the facts now established before us are very similar to the facts in the case already referred to, viz., *Nilkanta Rai v. Gosto Behari Chatterjee* (2). There the petitioner had obtained a money de-

crece against his judgment-debtor in the Court of the Subordinate Judge. A writ of attachment was issued and served, whereupon a claimant appeared but his objection was overruled. The claimant next proceeded to sue for the cancellation of the order and obtained an injunction restraining the petitioner from proceeding with the execution of his decree till the suit had been decided. Thereupon the Subordinate Judge stayed the sale and proceeded to dismiss the execution case. The latter was discontinued not by reason of default on the part of the decree-holder, but at the instance of an unsuccessful claimant who instituted a suit to contest the validity of the order in the claim case. Meanwhile proceedings were taken by the opposite party, another creditor of the same judgment-debtor; for realization of his dues. The sale at his instance was fixed for April 20, 1917. On the application of the petitioner the Subordinate Judge wrote a letter to the Munsif for the stay of the sale. The Munsif received the letter after the sale had taken place. Thereupon the petitioner applied to the Subordinate Judge to attach the sale proceeds deposited in the Munsif's Court and to distribute them rateably. The Subordinate Judge having, on June 9, 1917, dismissed this application, the petitioner moved the High Court and obtained a rule. It will be seen that the petitioner was not entitled to rateable distribution under S. 73 of the Code, which provides that where assets are held by a Court and more persons than one have, before the receipt of such assets, made application to the Court for the execution of decrees for the payment of money passed against the same judgment-debtor and have not obtained satisfaction thereof, the assets, after deducting the costs of realization, shall be rateably distributed among all such persons. The petitioner had not applied for execution of his decree to the Court which held the assets. Indeed, he was not competent to make such an application, as the decree obtained by him in the Court of the Subordinate Judge could not possibly be executed by the Munsif. Nor had he been able to obtain the benefit of the principle recognised in S. 63. If the petitioner had been able to apply in time to the Subordinate Judge under S. 63, the sale might have been held in his Court. The sale, however, had been actually held

(2) [1917] 46 Cal. 64=44 I.O. 249=27 O.L.J. 145.

by the Munsif, and was a valid sale, under S. 63 (2), though the Court found that in the events which had happened neither S. 63 nor S. 73 applied. Then the Judges considered whether in the actual circumstance of the case it was still possible for the Code to give relief to the petitioner. The Court of the lower grade had actually held the sale in ignorance of the fact that proceedings in execution had already been taken in the Court of a higher grade, and that the property brought to sale was subject to a legally subsisting attachment effected in that Court. Their Lordships, after referring to *Patel Naranji Morarji v. Haridas Navalram* (1) and *Bykint Nath Shaha v. Rajendra Narain Rai* (3), said (p. 69) :—

"If we compare the observations in the two cases just mentioned, it becomes obvious that Sir Charles Sargent pointed out the correct procedure to be followed in cases of this character, namely, the Subordinate Judge is not to direct the Munsif to transmit the proceeds to his Court, but should move the District Judge to have the proceeds so transferred."

As a matter of fact Sir Charles Sargent said that the applicant, and not the First Class Subordinate Judge, might possibly have applied to the District Judge for a transfer of the sale proceeds. However that may be, the High Court made the following order :—

"Rule obtained by the applicant is made absolute, and the order of the Subordinate Judge is set aside. It is directed that the sale proceeds should be transferred from the Court of the Munsif to the Court of the Subordinate Judge to be rateably distributed by him amongst the decree-holders who had qualified themselves under S. 73 of the Civil Procedure Code including the present petitioner."

I can see no difference between the facts of that case and the facts in this case. The property was sold by the Hubli Court, when it had already been attached by an earlier order of the First Class Subordinate Judge. The present appellant could not apply to the Hubli Court for rateable distribution, and if the contention of the present opponents were to prevail, he would lose entirely the fruits of his attachment. That cannot be a correct exposition of law which should prevail. I think the first order made by the Subordi-

nate Judge was right, for I see no reason why the application for transfer of the sale proceeds should be made to the District Judge.

Treating this as an application under our extraordinary jurisdiction, we make an order that the sale proceeds along with the darkhast, pending in the Hubli Court for rateable distribution, should be transferred from the Hubli Court to the Court of the First Class Subordinate Judge of Dharwar, the sale proceeds to be rateably distributed by him amongst the decree-holders who have qualified themselves under S. 73 of the Civil Procedure Code. The appellant to have his costs against the first respondent.

Coyajee, J.—I agree.

Appeal allowed as an Application.

1925 BOMBAY 422

MACLEOD, C. J. AND COYAJEE, J.

Kondi Savla Bachal—Appellant.

v.

Banachand Cheniram Marwari—Respondent.

Second Appeal No. 34 of 1923, Decided on 24th February 1925, from the decision of the 1st Cl. Sub. J., A. P. at Satara, in Appeal No. 459 of 1921.

Benamidar—Suit by or against benamidar binds the real owner.

The benamidar has no beneficial interest in the property or business that stand in his name; he represents, in fact, the real owner, and so far as their relative legal position is concerned he is a mere trustee for him. 46 Cal. 566 Foll.

Suit by or against benamidar binds the real owner.

[P 423 C 1,2]

M. V. Bhat—for Appellant.

T. N. Valavalkar—for Respondent.

Macleod, C. J.—The plaintiff sued to recover possession of the plaint property with mesne profits, alleging that on May 23, 1918, he purchased it at a Court auction for Rs. 530 in darkhast No. 654 of 1917 in execution of the decree obtained by him in suit No. 887 of 1913.

That suit was filed on a mortgage given by one Krishna Appa, against his widow Vithabai and one Patlu Babaji.

The plaintiff obtained a sale certificate dated August 15, 1918. The defendant claimed that he had obtained a decree in suit No. 649 of 1911 against Vithabai and in execution of the decree the property

(3) [1886] 12 Cal. 333.

was sold at auction on February 1, 1913 and was purchased by Patlu bin Babaji benami for the defendant; that since then he had been in possession; that the plaintiff collusively obtained the decree against Patlu in 1913; and that he was not bound by it. The trial Court held that the defendant had not proved that Patlu Babaji was his benamidar, that the plaintiff had proved his title to the property in suit and therefore passed a decree for possession in favour of the plaintiff.

In appeal it was held that Patlu was defendant's benamidar. The next point argued was that the plaintiff, who knew this avoided bringing defendant on the record in the previous suit, and did so to evade the suit being defended, and that the proceedings should on that account be reopened. The Judge said "I do not think any material is shown to make it necessary that the whole suit proceedings, which no doubt were *ex parte* should be reopened." He then held that the decree in suit No. 887 of 1913 did not bind the defendant, so that the decree and the sale proceedings in darkhast No. 654 of 1917 had not the effect of extinguishing defendant's equity of redemption. He passed, therefore, a redemption decree directing the defendant to pay to the plaintiff within six months of the date of the decree the amount due on the decree in suit 887 of 1913, with interest at six per cent. -

The plaintiff has appealed, and the question now is whether the defendant is bound by the decree against Patlu in suit No. 887 of 1913. The appellant relies upon the decision of the Privy Council in *Gur Narayan v. Sheolal Singh* (1). Their Lordships said at page 574 :-

"So long, therefore, as a benami transaction does not contravene the provisions of the law the Courts are bound to give it effect. As already observed, the benamidar has no beneficial interest in the property or business that stand in his name; he represents, in fact, the real owner, and so far as their relative legal position is concerned he is a mere trustee for him. Their Lordships find it difficult to understand why, in such circumstances, an action cannot be maintained in the name of the benamidar in respect of the property although the beneficial owner is no party to it. The bulk of judicial opinion

in India is in favour of the proposition that in a proceeding by or against the benamidar, the person beneficially entitled is fully affected by the rules of *res judicata*. With this view, their Lordships concur. It is open to the latter to apply to be joined in the action; but whether he is made a party or not, a proceeding by or against his representative in its ultimate result is fully binding on him."

Applying the decision in that case to the facts of this case, the defendant on whose behalf Patlu purchased the property at a Court sale in execution of the decree in suit No. 651 of 1911 was bound by the decree passed in favour of the plaintiff in his suit brought against Patlu. He cannot, therefore, resist the plaintiff who is demanding possession as the auction-purchaser. Nor can he claim to be entitled to redeem the property since the plaintiff's decree and the sale of the property in execution extinguished that right. We allow the appeal and restore the decree of the trial Court with costs throughout.

Appeal allowed.

★ 1925 BOMBAY 423

MACLEOD, C. J. AND COYAJEE, J.

Chhotallal Mohanlal—Applicant.

v.

Ambalal Hargovan—Opponent.

C. E. A. No. 140, of 1923, Decided on 5th March 1925, against an order of the D. J. Ahmedabad, in Appeal from Order No. 40 of 1922.

★ *Civil P. C., O. 9, R. 8*—Plaintiff arriving late in Court but on the same day—Suit if already dismissed for default, should be restored on payment of costs if any.

When a party arrives late before the Judge, and finds that his suit or application has been dismissed before his arrival, he is entitled to have his suit or application restored on payment of such costs as may have been incurred, by reason of his default, by the opponents.

[P. 424, C.1]

K. N. Koyajee—for Applicant.

P. B. Shingne—for Opponent.

Macleod, C. J.—The applicant before us was the plaintiff in a suit pending in the Court of the First Class Subordinate Judge of Kaira. It was called on for settlement of issues on June 15, 1922. At that time the applicant was not present in Court, and the suit was dismissed for default. He came into the Court

(1) [1918] 46 Cal. 566=17 A.L.J. 66=36 M.L.J. 68=49 I. C. 1=9 L. W. 335.

about two hours later and told the Judge that his train was late on account of an accident, and also pointed out the difficulty of getting tongas. The applicant was asked by the Court why he did not wire from Mehmabad. The applicant replied that he did not do so as he was to come. He adduced evidence that tongas were not available; that the train was late; and that he had gone into the Mehmabad station to wire to the Court. An application was made thereafter (Miscellaneous Application No. 9 of 1922), to restore the suit to the board. The Judge considered the evidence of the applicant was untrustworthy, and that even if the train by which the applicant was travelling had reached Mehmabad station in time, he would not have been able to reach the Court before Court hours. The applicant should have started on the preceding day. He, therefore, rejected the application with costs.

In appeal the District Judge said:—

"In the present case the summons had been issued for the settlement of issues. Neither the plaintiff nor his pleader put in an appearance. The absence of the plaintiff attracted the consequences provided in Order 9, rule 8. There was, therefore, nothing irregular in the dismissal of the suit under that rule. The appeal is dismissed under Order 41, rule 11, of the Civil Procedure Code."

The applicant has come to this Court in revision. It is true that there was nothing irregular in the dismissal of the suit, the mistake occurred in rejecting the application to restore the suit to the file. We have more than once laid it down as a rule of practice to be observed in the subordinate Courts that when a party arrives late before the Judge, and finds that his suit or application has been dismissed before his arrival, he is entitled to have his suit or application restored on payment of such costs as may have been incurred by reason of his default by the opponents. The proper order, therefore, for the Subordinate Judge to have made was to grant the application and make the applicant pay the costs. That is the order which we make now. As the applicant was in default, there will be no order as to costs in the lower Court and in this Court.

Application allowed.

★ 1925 BOMBAY 424

MACLEOD, C. J. AND COYAJEE, J.

Kisan Tukaram Takle and others—Appellants.

v.

Bapu Tukaram Ghadling and others—Respondents.

Second Appeal No. 255 of 1924, Decided on 27th February 1925, from the decision of the D. J., Ahmednagar, in Appeal No. 22 of 1923.

★ *Hindu Law—Succession—Bombay School—Daughters take absolute estate by inheritance as tenants-in-common.*

In the Bombay Presidency, under the Hindu law daughters inheriting from their father take an absolute interest. If there is no division between them, they take as tenants-in-common and not as joint tenants. [P. 424, C. 2]

Y. N. Nadkarni—for Appellants.

G. P. Murdeshwar—for Respondents

* **Facts.**—This was a suit for possession of a house which originally belonged to one Appaji. He died leaving a widow Tulsabai and two daughters Laxmi who was defendant No. 2 and Manjula. Manjula had a son by name Laxman to whom Tulsabai conveyed the whole house by way of gift. After this gift had been made Manjula died Laxman sold the house to plaintiff Bapu who borrowed from vendor Laxman after the sale deed on the security of the house and Bapu remained in possession on executing a rent note to Laxman. One Kissan who was defendant No. 1 in this suit sued as agent of Laxman on the rent note and recovered possession of the house from Bapu.

Subsequently Bapu sued to recover possession. The appellate Court reversing the decree of trial Court held that the daughters got a moiety of the house on Tulsabai's death and hence Laxman inherited Manjula's moiety. This moiety passed by sale to Bapu. Kissan therefore appealed to the High Court.

Macleod, C. J.—We think this case is governed by the decision in *Vithappa v. Savitri* (1). Daughters under the Hindu law inheriting from their father take an absolute interest, and if there is no division, they take as tenants-in-common and not as joint tenants. There was, therefore, no question in this case of taking by survivorship. The appeal is dismissed with costs.

Appeal dismissed.

★ 1925 BOMBAY 425

CRUMP AND COYAJEE, JJ.

Tukaram Mahadu Tandel—Plaintiff—Appellant.

v.

Ramchandra Mahadu Tandel and others—Defendants—Respondents.

First Appeal No. 323 of 1923, Decided on 17th March 1925, from the decision of the 1st Cl. Sub. J., Thana, in Suit No. 479 of 1921.

★ (a) *Civil P. C., O. 23, R. 1*—In some cases Plaintiff cannot withdraw.

As a general proposition a plaintiff can at any time withdraw a suit but that a plaintiff cannot always and in all circumstances withdraw is a proposition which is not without authority; for instance, in a partition suit a defendant seeking a share is in the position of a plaintiff and one plaintiff cannot withdraw without the permission of another according to O. 23, R. 1 (4).

[P. 426, C. 1, 2]

★ (b) *Civil P. C., O. 23, R. 1 and R. 3*—Compromise effected—Subsequent withdrawal by plaintiff is not permissible.

When in a partition suit a defendant has by a compromise with the plaintiff acquired rights which otherwise could not have existed, it is not open to the plaintiff who has consented to the compromise afterwards to annul its effect by withdrawing the suit. 29 Bom. 13 Foll.

[P. 427, C. 1]

★ (c) *Hindu Law—Succession—Adopted son in Bombay takes one-fourth of the share of a subsequently born natural son, even among Sudras.*

In Bombay Presidency the share of the adopted son is one-fourth of the share of the subsequently born son, even among Sudras. 17 Bom. 100 Foll. and 44 Mad. 656 (P. C.) Expl.

[P. 427, C. 2]

G. N. Thakor and W. B. Pradhan—for Appellant.

B. K. Dhurandhar with G. S. Mulgaonkar—for Respondents.

Crump, J.—The plaintiff filed this suit as the adopted son of Mahadu Dharmaji who was defendant No. 1 in the suit. Defendant No. 1 who died during the pendency of the suit had three wives Defendants No. 3, 4 and 5. Defendant No. 2 is the son of the deceased defendant No. 1 by defendant No. 5. Defendants Nos. 6, 7 and 8 are the daughters of defendant No. 1 by defendant No. 5. This suit was one for partition. Plaintiff claimed a share of one half.

Defendant No. 4 alone filed a written statement. The main defence raised was that the adoption of plaintiff was not proved but it was also urged that plaintiff's share on the basis of the adoption would be $\frac{1}{21}$ and not $\frac{1}{2}$. Certain minor

points were raised as to the details of the proposed partition.

The suit so far is in no way unusual but certain points have arisen in consequence of the course followed in the lower Court. Further it is conceded that defendant No. 2 was born after the date of the alleged adoption, and this circumstance has given rise to some argument as to the proper division of the property in such a case.

The first point is in substance a question of procedure. On February 5, 1923, plaintiff and some of the defendants moved for an adjournment with a view to a compromise; the case stood over till March 13, and on that date the following entry appears in the *Roznama*:

"The case is adjourned as there is a likelihood of a compromise being made between the parties."

On March 14 there is the following note:

"Compromise has not been effected until now and so the case is adjourned to 16/3."

On March 16, plaintiff put in an application stating that he desired to withdraw the suit. Defendants' pleader objected to the proposed withdrawal on the ground that there had been an adjustment of the suit.

The trial Court held that the adjustment was proved; that plaintiff could withdraw if he wished, but that his withdrawal would not deprive the Court of jurisdiction to enquire into and record the compromise, and to determine the other issues in the suit.

The first question is one of facts: "Was there any concluded agreement between the parties?" That there is a document embodying certain terms is not disputed. It is Exhibit 48 in the suit. Nor is it disputed that it is signed by the parties. It is dated March 13. There was an enquiry by the Court as to this document. Mr. Patel, the defendants' pleader, gave evidence. He stated that the parties consented to the terms contained in this document on March 13, and that it was signed by them in token of their consent. There is nothing whatever on the other side, except the argument which is sought to be based on the entry in the *Roznama* of March 14, which is set out above. That entry means no more than the parties then before the Court were not at that time at one as to

the compromise. It does not mean that there was no compromise on March 13. Upon this question of fact the decision of the trial Court is correct.

The facts therefore stand thus. On March 13, plaintiff agreed to the terms contained in Exhibit 48. He then changed his mind, and endeavoured to withdraw the suit on March 16. It is argued that a plaintiff can at any time withdraw a suit and Order 23, rule 1, clause (1), is relied upon. As a general proposition that is so, but is it so in the special circumstances of this case? It would clearly be most inequitable that a party should be allowed to defeat a compromise by such a device as this, and apart from the compromise I should be prepared to hold that in the special circumstances of this case defendants' claim cannot in this manner be frustrated.

The terms of Order 23, rule 3, are imperative. The Court if satisfied that the suit has been compromised is bound to pass a decree in accordance with the terms of the compromise. The special procedure there laid down is not affected by the general provisions of Order 23, rule 1. But it is argued here that the terms embodied in Exhibit 48 are not such as to adjust the suit wholly or in part. Therefore no decree could be passed on those terms. That is the test laid down in *Muhammad Zahur v. Cheda Lal* (1) as to S. 375 of the Code of 1882, and on the words of rule 3, which to this extent is identical with S. 375, I agree with deference that the test is correctly stated. But if it is applied here is it correct to say that no decree could have been made in terms of Exhibit 48? There could at least have been a decree that plaintiff was the validly adopted son of defendant No. 1. But after the compromise was recorded by the Court plaintiff again withdrew from the suit (see Exhibit 50). His first intimation (Exhibit 42) was apparently no more than a threat for he continued to take part in the proceedings (up to April 13, on which date the compromise was recorded by the Court. The Court clearly could not have passed a complete decree on that date and it would be difficult to hold that anything in Order 23, rule 3, could deprive plaintiff of his right to withdraw after all the proceedings required by that rule were at an end.

But there are other and wider considerations which lead me to hold that plaintiff could not have withdrawn so as to defeat the defendants' claim. It is relevant to point out that in a partition suit a defendant seeking a share is in the position of a plaintiff and one plaintiff cannot withdraw without the permission of another (Order 23, rule 1 (4)). Were procedure by counter-claim in force outside Bombay the position would be clear enough. There would be a counter-claim by defendant No. 4 for her share, and the defendant in a counter-claim is a plaintiff, and a counter-claim cannot be defeated by the withdrawal of the plaintiff in the suit. That is the true position though it is obscured by technical differences in procedure. And it would have been open to the Court to make defendant No. 4 a plaintiff in which case plaintiff's withdrawal would have been without significance. Upon this point reference may be made to *Edulji Muncherji Wacha v. Vullebhoy Khanbhoy* (2). That was a suit by the plaintiff against twelve persons who were his partners. Plaintiff settled with most of these persons, and desired to withdraw. Two of the defendants objected, and the Court made them plaintiffs and proceeded with the suit. Were it necessary it would be within our powers to make defendant No. 4 a plaintiff now. But that a plaintiff cannot always and in all circumstances withdraw is a proposition which is not without authority. In *Satyabhamabai v. Ganesh Balkrishna* (3) the facts were shortly as follows. Plaintiff sued for partition; defendants Nos. 7, 8 and 9 were widows of deceased co-parceners. It was agreed between plaintiff and these defendants that they should receive the shares to which their deceased husbands were entitled. Plaintiff then applied for leave to withdraw with liberty to bring a fresh suit. This was refused and a decree was made in accordance with the agreement. In first appeal plaintiff again applied for leave to withdraw and again leave was refused. Plaintiff thereupon withdrew unconditionally; the Court held that the result was that the decree of the trial Court must be set aside. In dealing with this point in second appeal, Jenkins, C. J. said:—

(2) [1888] 7 Bom. 167.

(3) [1904] 29 Bom. 13=6 Bo n. L. R. 533.

(1) [1892] 14 All. 141=(1892) A. W. N. 3.

"It appears to us clear that when in a partition suit a defendant has by concession of the plaintiff acquired rights which otherwise could not have existed, it is not open to the plaintiff who has made that concession, afterwards to annul its effect by withdrawing the suit in the Appellate Court."

In this case defendants Nos 3, 4 and 5 have no independent right to claim a share. Under Hindu law a wife can claim a share only on a partition between her husband and her son. These defendants have by this suit acquired that right and the terms of the compromise (Exhibit 48, para 6) plainly concede it. Therefore though the circumstances are not identical, this case falls within the principle enunciated by Jenkins, C. J., in *Satyabhamabai v. Ganesh Balakrishna* (3).

Upon these grounds I am of opinion that the technical objection raised by plaintiff should not be allowed to prevail, and the further points arising in the appeal must be considered.

The points which thus arise for decision are:—

(a) What share should plaintiff get in a partition?

(b) What share should defendants Nos. 3, 4 and 5 get?

(c) How is the share of the deceased defendant 1 to be distributed.

Upon the first point it is argued that the parties are Sudras, and that in the case of Sudras the adopted son and the after-born son take equal shares. Reliance is placed upon the decision of the Privy Council in *Perrazu v. Subbarayadu* (4). No doubt this case is an authority for holding that in Madras and in Bengal among Sudras the rule is that for which the appellant's counsel contends. But the question of fact here has not been determined. The parties are "Agris" by caste and it cannot be assumed that Agris are Sudras. The point was never taken in the lower Court. The parties were content to leave the determination of their shares in the hands of the Court, without any information upon this point. We could no doubt raise an issue and remand it to the lower Court for determination but in the view of the law which commends

itself to me it is unnecessary to do so. Assuming that the parties here are Sudras ought we to apply to this Presidency the rule which their lordships of the Privy Council have laid down as prevailing in the Madras and Bengal Presidencies? No doubt Hindu law as interpreted in this Presidency recognizes that in certain cases the rule varies according as the parties belong to the twice born classes or to the Sudra class. But upon the point before us no such distinction has ever yet been suggested, much less recognized. The leading case on this side of India is *Giriappa v. Ningappa* (5). In that case the parties were apparently Lingayats who are classed as Sudras by the decisions of this Court. It was held there that the share of the adopted son is one-fourth of the share of the after-born son. That has always been the rule. Indeed it is stated in Steel's work on Hindu Law and Custom as far back as 1868 that there is no exception to the rule in the case of Sudras (p. 47). Now the *ratio decidendi* in the case of *Perrazu v. Subbarayadu* (4) was stated as follows at pp. 299-300 of the report:—

"The inference which their Lordships draw from the materials before them is that the rule of the Dattaka Chandrika that on a partition of the joint family property of a Sudra family an adopted son is entitled to share equally with the legitimate son born to the adoptive father subsequently to the adoption had been accepted and acted upon for at least more than a century in the Presidency of Madras, as the law applicable in such cases to Sudras..... It also appears to their Lordships that that rule of the Dattaka Chandrika, although not supported by any ancient text of the Smritis or by the Mitakshara is not inconsistent so far as Sudras are concerned with the Smritis or the Mitakshara."

In this Presidency where the rule of the Dattaka Chandrika upon the question at issue has never been followed, for no case, and no kind of judicial or other pronouncement is forthcoming, (and as I have said the leading case is against it) ought we to accept the rule upon the authority of the Dattaka Chandrika alone? In my opinion we should err if we did so. The authority of the Dattaka Chandrika has never been placed so high in Western India as in Bengal and Madras [*Sri* (5) [1893] 17 Bom. 100.

(4) [1921] 44 Mad. 656=48 I. A. 280=19 A. L. J. 621=28 Bom. L. R. 920=41 M. L. J. 33=84 C. L. J. 56=14 L. W. 270=(1921) M. W.N. 540=61 L. O. 690=28 O.W. N. 1 (P.O.)

Balusu Gurulingaswami v. Sri Balusu Ramalakshammamma (6) and *Waman Raghupati Bova v. Krishnaji Kashiraj Bova* (7)]. The case is one where the principle of *stare decisis* should be maintained.

The remaining points present no difficulty. Three wives take equal shares with the father and the son, the adopted son gets a share equivalent to one-fourth of the son's share. The arithmetical result is that plaintiff gets $\frac{1}{21}$ and each of the other shares is $\frac{4}{21}$. The inheritance as regards the share of the deceased must be in the same proportion. No other result is logically possible.

I would, therefore, confirm the decree and dismiss the appeal with costs. The cross-objections were not pressed and must also be dismissed with costs.

Coyajee, J.—I am of the same opinion.

The facts of this case are sufficiently set out in the judgment of my learned colleague. The plaintiff claiming to be the adopted son of Mahadu (defendant No. 1) has brought this suit to obtain by partition his share in the joint family properties. The effect of such partition would be to break up the joint family estate out of which Mahadu's wives (defendants Nos. 3, 4 and 5) had a right to be maintained. And therefore one result of this action is that each of them becomes entitled to claim a share equal to that of a son, and to enjoy that share separately. On that footing, the fourth defendant Mahadibai contended that plaintiff was entitled only to a $\frac{1}{21}$ th part of the family estate. At the date of the institution of the suit the bulk of the estate was, it would seem, in Mahadu's possession. While the suit was in progress Mahadu died. Plaintiff who was the sole surviving adult male member of the family, took possession of the immovable properties; and on March 16, 1923, he applied to the Court in these terms:—

"Almost all the ornaments on the person of my wife as well as ornaments on the person of the defendant's wife and cash in this suit have been secured possession of by the defendant...but immovable property, i. e., lands and houses have come into the plaintiff's possession on the death

of the plaintiff's adoptive father. Under such circumstances the plaintiff does not think it desirable to proceed with the partition suit. Therefore the plaintiff makes this application to withdraw this suit" (Exhibit 42). The defendants protested that the suit had already been adjusted by a lawful agreement and that therefore it was no longer open to the plaintiff to withdraw it. On these contentions the trial Judge framed appropriate issues, and on the evidence adduced before him held that the suit had been adjusted on March 13. He accordingly directed that the agreement should be recorded and given effect to. In my opinion his conclusions and also his procedure were correct. Here was a suit for partition; the defendants disputed the plaintiff's adoption and they further contended that certain properties which were in the plaintiff's possession belonged to their family; on March 13th the parties settled their differences by making mutual concessions; the settlement was evidenced by a writing (Exhibit 48) signed by the parties in token of their consent; the document contained certain terms relating to the subject-matter of the suit; and the terms were such as could be embodied in a declaratory decree—although not in such a decree as might completely dispose of the suit. The Court had therefore jurisdiction to give effect to the agreement (Order 23, rule 3). A plaintiff denying such agreement or seeking to recede from it cannot deprive the Court of such power by claiming to withdraw the suit.

By this agreement, Exhibit 48, which was in the form of an application to the Court, the parties settled all their disputes and agreed that the determination of their respective shares in accordance with law should be made by the Court and then a decree should be obtained in terms of that document. On behalf of the appellant (plaintiff) it was contended before us that as the agreement itself did not specify the extent of the shares but left its determination in accordance with law to the Court, there was no adjustment of the suit within the provisions of Order 23, rule 3, and that therefore it was competent to him to withdraw the suit. I am unable to accept this contention. In the first place, this was a suit of a special nature. "It is the right of every defendant in a partition suit to ask to

(6) [1899] 22 Mad. 398=21 All. 460=26 I. A. 113=3 C. W. N. 427=9 M. L. T. 67=1 Bom. L. R. 226=7 Sar. 330 (P. C.)

(7) [1890] 14 Bom. 249 (F. B.)

have his own share divided off and given to him...A defendant claiming a share on partition is, *qua* that claim, in the position of a plaintiff and...is clearly entitled to have his own share ascertained and partitioned." (*Shivmurteppa v. Virappa* (8)). That being so, the plaintiff cannot withdraw a suit of that character as a matter of course. If he desires to withdraw, the defendant claiming a share may be made a plaintiff and he might apply to have the plaint amended so as to make the former plaintiff a defendant (*Edulji Muncherji Wacha v. Vullebhoy Khanbhoy* (2)). Moreover, this particular case falls within the principle enunciated by Jenkins, C. J. in *Satayabhamabai v. Ganishe Balakrishna* (3) and referred to in the judgment of my learned colleague. In my opinion, the right of plaintiff to withdraw his suit, as affirmed in Order 23, rule 1, sub rule (1) is not absolute in all cases and may be controlled by rights existing in other parties to the suit.

As regards the extent of the shares to which the different parties to this suit are entitled, the decision of the lower Court is right. It is contended before us that the parties are Sudras and that therefore the plaintiff is entitled to a share equal to that of the second defendant. This argument is based on the assumption that the parties are Sudras. No such contention was raised before the trial Court, and the materials necessary for a determination of the question are therefore wanting. The parties are admittedly "Agris"; and there is a reason to believe that "Agris" claim to be Kshatriyas. But however that may be, the accepted rule in this Presidency is that both in the districts governed by the Mitakshara and those specially under the authority of the Mayukha, the right of the adopted son when there is an after-born son, extends to a fifth of the father's estate. It was so held by Telang, J. on a review of the authorities, in *Giriapa v. Ningappa*, (5) and it is not shown that this Court has applied a different rule where the parties are Sudras. Reliance was however, placed on the decision of the Privy Council in *Perrazu v. Subbarayadu* (4). The question there was whether in the Sudra caste in the Madras Presidency an adopted son shares equally with an after-born son on partition of the family property. "The question," their Lordships observe (p. 288).

(8) [1899] 24 Bom. 128=1 Bom. L. R. 620.

"is an important one, and is by no means an easy one for this Board to decide. The question depends on a text of the Dattaka Chandrika and on the authority to be allowed in the Presidency of Madras to that text." Their Lordships examined the reported cases in that Presidency on the subject and concluded thus (p. 299): "The inference which their Lordship draw from the materials before them is that the rule of the Dattaka Chandrika that on a partition of the joint family property of a Sudra family an adopted son is entitled to share equally with the legitimate son born to the adoptive father subsequently to the adoption had been accepted and acted upon for at least more than a century in the Presidency of Madras, as the law applicable in such cases to Sudras." We have no reason to believe that the rule propounded in paras. 29 and 32 of section V of the Dattaka Chandrika has been so accepted and acted upon in this presidency and there is therefore no justification for holding that the decision in *Giriapa's* case (5) is not applicable to the parties to this suit, even if they were Sudras.

For these reasons I agree in confirming the decree of the lower Court.

Appeal Dismissed.

1925 BOMBAY 429

CRUMP, J.

P. B. Ponde—Applicant.

v.

Emperor—Opposite Party.

Mis. Appeal Case No. 22 of 1925, Decided on 15th May, 1925.

Evidence Act, S. 47—"Habitually" refers to invariability of practice.

The term "habitually" in S. 47 means "Usually," "generally," or "according to custom." It does not refer to the frequency of the occasions but rather to the invariability of the practice.

The opinion of a record-keeper, who in the course of his official duty has to examine and file papers sent to him, is relevant to prove the hand-writing of a person whose papers are so filed, though the number of such papers may not be great.

[P 480 C 2]

Kanga with Kemp—for the Crown.

Sen Gupta with N. G. Nadkarni and Velinker—for Accused.

Crump, J.—The witness Shankar Vaman Chaskar was called yesterday and has given his opinion as to whether the

writing on certain documents is the writing of accused No. 2. The question has been raised as to the relevancy of this opinion. The point has to be decided in the light of S. 47 of the Indian Evidence Act. Under that section when the Court has to form an opinion as to the person by whom any document is written or signed the opinion of any person acquainted with the handwriting of the person by whom it is supposed to be written or signed is a relevant fact. It is necessary, therefore, to decide whether the witness is a person acquainted with the handwriting of accused No. 2.

The evidence of the witness is to the effect that he is a clerk employed in the English branch of the Household Department at Indore, and that all English papers in that office come in to his charge for the purpose of being examined and filed. His duties are described by his designation, *viz*, "English Record Keeper, Household Department." It further appears that accused No. 2 is a "Mankari" or Court dignitary, and as such has official relations with the Household Department. The witness says that seven or eight documents purporting to be written by accused No. 2 have come into his charge to be examined and filed in the ordinary course of official business.

The explanation to S. 47 defines those persons who are said to be acquainted with the handwriting of another. There are three categories and it is obvious that on the facts the witness does not fall under either of the first two of these. The third category is described as follows: "When in the ordinary course of business documents purporting to be written by that person have been habitually submitted to him."

It is clear that the witness is a person to whom in the ordinary course of business documents purporting to be written by accused No. 2 have been submitted. To that extent he is in the position of the clerk "C" who figures in the illustration to the section, for C plainly does not fall under either of the first two categories. The question, therefore, turns on the meaning of the word "habitually" and the objection raised is based on that word alone. The argument in brief is that "habitually" connotes "frequency" and that in this case the instances are too few in number to fulfil the requirements of that word.

In my opinion the word "habitually" means "usually," "generally" or "according to custom." It does not refer to the frequency of the occasions but rather to the invariability of the practice. It would for instance, be perfectly permissible to say "A habitually receives a letter from X once every year." If my view is correct the objection is not sustainable. I hold, therefore, that the opinion of Chaskar is relevant to prove the writing as to which he speaks. With the cogency of this evidence I am not concerned, for that is a question for the jury. I, therefore overrule the objection and allow these documents to be read.

Objection overruled.

1925 BOMBAY 430

MACLEOD, C. J. AND COYAJEE, J.

Trimbak Narayan Pujari — Appellant.
v.

Damu Bhaui Sali—Respondent.

Second Appeal No. 165 of 1924, Decided on 17th February 1925, from the decision of the First Class Sub. Judge, A. P., at Nasik, in Appeal No. 185 of 1921.

Bombay Land Revenue Code (Act 5 of 1879)—Ex parte grant of Sanadat City survey confers no title.

There is nothing in the Bombay Land Revenue Code justifying the conclusion that a person who gets a sanad at the City Survey on his *ex parte* application, is entitled to turn out the person in possession of the land, unless such person proves a better title. [P. 430, C. 2.]

D. R. Patwardhan—for Appellant.

R. G. Pradhan—for Respondent.

Macleod, C. J.—The plaintiff failed to prove his title. It has been argued that because he got his name entered in the City Survey as the owner of the land in dispute and obtained a *sanad*, the Court is bound to consider him as the presumptive owner of the land, and that the defendant was bound to show some better title in order to defeat the plaintiff's claim. But there is nothing in the Bombay Land Revenue Code which justifies us in saying that a person who gets a *sanad* at the City Survey on the *ex parte* application, is entitled to turn out the person in possession of the land, unless he shows that he has a better title. The appeal is dismissed with costs.

Appeal dismissed.

1952 BOMBAY 431 (1)

MACLEOD, C. J. AND COYAJEE, J.

Nilkant Vasudeo Samant and others—Appellants.

v.

Balwant Pandurang Samant—Respondent.

Appeal No. 3 of 1924, Decided on 6th February 1925, from an order of D. J., Ratnagiri, in Miscellaneous Appeal No. 13 of 1922.

Civil. P. C. Order 7, Rule 10—Order under—No Second appeal lies.

Only one appeal lies from an order passed under Order 7 Rule 10, ordering return of plaint for presentation to the proper Court under Order 43. Rule 1(a) [P. 431, C. 1]

R. S. Parulekar and T. N. Walavalkar—for Appellants.

A. G. Desai—for Respondent.

Macleod, C. J. The plaintiff filed this suit in the Court of the joint Subordinate Judge at Malvan who held that the Court had no jurisdiction and directed the plaint to be returned for presentation to the proper Court. The plaintiff appealed to the District Judge, who held that the Malvan Court had jurisdiction in the case, and accordingly sent it down for trial according to law. The defendants filed a second appeal to this Court, and the preliminary objection has been taken by the respondent's pleader that no second appeal lies. The order made by the Subordinate Judge was under Order 7, Rule 10. Under Order 43, rule 1 (a), an appeal lies under the provisions of S. 104 from an order under Order 7, rule 10. Section 104 says: "An appeal shall lie from the following orders, and save as otherwise expressly provided in the body of this Code or by any law for the time being in force from no other orders...(i) any order made under rules from which an appeal is expressly allowed by rules." Sub-section (2) says "No appeal shall lie from any order passed in appeal under this section." It is clear, therefore, that this is an order passed by the District Judge in appeal from the order of the Subordinate Judge. That appeal was admitted under Order 43, but no further appeal is allowed under S. 104. The appeal is dismissed with costs on the ground that no second appeal lies.

Appeal dismissed.

★ 1925 BOMBAY 431 (2)

(2) MACLEOD, C. J. AND CRUMP, J.

Duma Toma Rumav and others—Appellants.

v.

Nathu Farsha Kurel and others—Respondents.

Second Appeal No. 233 of 1923, Decided on 13th November 1924, from the decision of the Assistant Judge of Thana, in Appeal No. 205 of 1921.

★ *Specific Performance—Offer to sell—Offer not accepted by offeree—Offeree dying—Legal representatives cannot sue for specific performance.*

If an offer to sell property to a person is not accepted by the latter in his life-time, his legal representative cannot claim to have a right to accept the offer. [P. 432, C. 1]

R. W. Desai—for Appellants.

G. S. Rao—for Respondents.

Macleod, C. J.—In this suit the plaintiffs sued for specific performance of the contract for sale of the suit land by the 1st defendant's brother Juzia which the plaintiffs said was entered into on 5th December 1910, by Juzia Rumav on the one hand and on the other by Farsha Degu Kurel, father of plaintiffs Nos. 1 and 2, and Simav Ina, husband of plaintiff No. 3 and brother of plaintiff No. 4, both dead at the time of the suit. The terms of the document on which the plaintiffs relied are set out at page 2 of the print. The effect of that document was that Farsha and Simav could within a period of ten years from the date of the document tender Rs. 1,500 and demand a conveyance from Juzia. There are two ways in which the document can be read; (1) as an offer by Juzia which was to remain open for ten years acceptable by Farsha and Simav at their option; or (2) as an agreement by Juzia that he would hold the property for ten years at the disposal of Farsha and Simav and to sell to no one else. The latter would be a contract and the first would be an offer. If the document amounts to a contract then there was no consideration proceeding from Farsha and Simav for the agreement by Juzia to sell the property to no one else during the ten years. Therefore the contract would be unenforceable as being without consideration. But if the docu-

ment amounts to a mere offer to Farsha and Simav that a conveyance would be given on their tendering Rs. 1,500 within ten years, it would remain an offer and would not become a contract until the offer was accepted. Then the question would arise whether the offer made to Farsha and Simav could be accepted by their legal representatives. No authority has been shown to us for such a proposition, and it seems to me uncontested that if A makes an offer to B and nothing further is done before B dies, B's representatives could not claim to have a right to accept the offer made by A to B. On this ground it seems to me that the representatives of Farsha and Simav, who are the present plaintiffs, are either suing on a contract without consideration or are claiming a right to sue for a declaration that they are entitled to accept an offer made to their ancestors, which is not a right recognised in law. It seems to me, therefore, that the suit should have been dismissed, and accordingly we make that order with costs throughout.

Crump J.—I concur.

★ 1925 BOMBAY 432

MACLEOD, C. J. AND COYAJEE, J.

Laxman Waman Gadre—Appellant.

v,

Saraswati Ganesh Gadre and others—Respondents.

First Appeal No. 171 of 1923, Decided on 10th March 1925, from the decision of the 1st Class Sub-J., Nasik, in Application No. 62 of 1922, in Original Suit No. 448 of 1920.

(a) *Civil P. C., S. 35*—No appeal lies. No appeal lies against an order passed by a Judge directing how costs are to be taxed. [P 432, C 2]

★ (b) *Civil P. C., S. 35*—Several defendants—Suit dismissed against all—Each defendant is entitled to costs on the basis of suit valuation.

Where plaintiff's suit is dismissed each defendant is entitled to costs taxed on the basis of the suit valuation and not on the basis of what each defendant's interest might be in the suit itself. [P 432, C 2]

J. R. Gharpure—for Appellant.

P. G. Bapat—for Respondents.

Macleod, C. J.—In this case the plaintiff's suit was dismissed and he was ordered to pay the defendants' costs. When the decree was drawn up the plaintiff contended that the costs payable by the plaintiff were not in accordance with the judgment. Defendants Nos. 1 and 2 were allowed their costs on the valuation of the plaintiff's suit. Defendant No. 3 was also allowed his costs on the same value. The plaintiff then applied to the Judge to alter the method of taxation as appearing in the decree. The Judge declined to alter the taxation. The plaintiff has appealed, it would appear, not against the decree, which embodied the directions given in the judgment, but against the taxation of the costs. We doubt very much whether an appeal lies under any of the provisions of the Code against an order of the Judge directing how costs are to be taxed. However that may be, it is quite clear that the defendants were entitled to their costs taxed on the basis of the valuation of the plaintiff's suit. However many of the defendants may be claiming in separate interests, they are entitled to appear and defend the suit, and each defendant's pleader would be entitled under the Bombay Pleaders' Act to charge a fee based on the suit valuation for the purpose of pleader's fees. So that as the defendants were successful and their costs were ordered to be paid by the losing party each defendant was entitled to costs taxed on the basis of the suit valuation and not on the basis of what each defendant's interest might be in the suit itself. The appeal must be dismissed with costs.

Appeal dismissed.

1925 BOMBAY 433

MACLEOD, C. J. AND COYAJEE, J.

Bhau Vyankatesh Chakorkar—IN RE.

Cr. A. for Revision No. 403 of 1924.
Decided on 11th February 1925, against
an order passed by the First Class Magistrate, Pandharpur.

Criminal P. C., S. 195 (c)—Document produced
in a case—Production may be by another than the
alleged offender.

Sec. 195 (c) is wide enough to include any
document produced or given in evidence in the
course of a proceeding whether produced or given
in evidence by the party who is alleged to have
committed the offence or by any one else.

[P. 431, C. 2.]

P. B. Shingne—for Petitioners.

D. R. Manerikar—for Complainant.

S. S. Patkar—for the Crown.

Macleod, C. J.—The four petitioners
apply to this Court for revision of an
order passed on April 23, 1924, by the
First Class Magistrate of Pandharpur
holding that it was competent to him, on
the complaint of the opponent Shahabud-
din Babaji, to take cognizance of some of
the offences referred to in S. 195 (c) of
the Code of Criminal Procedure, and that
a complaint in writing under S. 476 was
unnecessary. The Additional Sessions
Judge rejected the petitioners' application
for revision on October 13, 1924.

The second petitioner owned a house at
Pandharpur which was sold by a registered
sale-deed on October 28, 1920, to one
Ibrahim Babaji, younger brother of the
complainant. On March 28, 1921, Ibrahim
Babaji brought a suit (No 295 of 1921)
against the second petitioner in the Court
of the Subordinate Judge at Pandharpur,
for possession of a portion of the house.
The second petitioner put in a written
statement, stating that the house was
given by him to his wife Chandrabhagabai
for maintenance during her life-time by a
kararnama dated December 11, 1919. The
kararnama was written by the petitioner
No. 1. and was attested by petitioners
Nos. 3 and 4. In the same proceeding
Chandrabhagabai appeared by a pleader
and applied that she should be made a
party to the suit. The petitioners contend
that the effect of what then happened
was that the *kararnama* was produced in
these proceedings by Chandrabhagabai's
pleader and shown to the presiding Judge.
Sometime thereafter proceedings were
instituted against petitioner No. 1 under

1925 B/55 & 56

S. 110. Criminal Procedure Code, in the
Court of the Sub-Divisional Magistrate at
Pandharpur: the *kararnama* was pro-
duced there and marked as Ex. 18 in the
case. In Suit No. 295 of 1921 a summons
was issued by the Subordinate Judge at
Pandharpur to the Sub-Divisional Magis-
trate to produce the *kararnama* in Court
on December 7, 1922; it was accordingly
sent with a clerk to the Subordinate
Judge's Court on January 22, 1923; and
it bears an endorsement of the clerk. In
obedience to another summons of the
Subordinate Judge's Court the Sub-Divi-
sional Magistrate again sent the *karar-
nama* to that Court on July 26, 1923, and
the Court subsequently ordered it to be
exhibited. On July 18, 1923, Shahabudin
Babaji filed a complaint in the Court of
the First Class Magistrate at Pandharpur,
and charged the petitioners with offences
under Ss. 465 and 467, Indian Penal Code,
alleging that the *kararnama* was forged.
The petitioners thereafter presented an
application to the First Class Magistrate
contending in effect that the case was
governed by S. 195, Criminal Procedure
Code, and that he could not take cogni-
zance of the alleged offences in the absence
of a complaint in writing under S. 476.
The application was dismissed. The
learned Additional Sessions Judge was
thereupon moved by two separate peti-
tions; he dismissed one of them for
default, and decided the other on the
merits, holding that a complaint under
S. 476 was not necessary.

The main ground on which the peti-
tioners' pleader argued the case before us
was that the *kararnama* was produced in
the proceedings under S. 110, Criminal
Procedure Code, and consequently, the
first petitioner, who was a party to that
proceeding, could not be prosecuted for
having forged the document except on the
complaint of the Sub-Divisional Magis-
trate. We agree with the Additional
Sessions Judge that the document was
not "produced or given in evidence"
within the meaning of the terms of S.
195 (c) Criminal Procedure Code, in Suit
No. 295 of 1921. But we do not agree
with him that the document was not
"produced" in the proceedings under
S. 110, Criminal Procedure Code. The
kararnama was produced and marked
there as Ex. 18, and was, therefore, given
in evidence in those proceedings. Section
195 (1) (c) is as follows:—

"No Court shall take cognizance of any offence described in S. 463 or punishable under S. 471, S. 475 or S. 476 of the same Code, when such offence is alleged to have been committed by a party to any proceeding in any Court in respect of a document produced or given in evidence in such proceeding, except on the complaint in writing of such Court, or of some other Court to which such Court is subordinate."

The Government Pleader would have us read into the Section some such words as "by such party or by a witness on his behalf." On this point the Additional Sessions Judge said:—

"This brings me to the necessity of investigation how the *kararpatra* found its way on the record of the Sub-Divisional Magistrate in the enquiry held under S. 110, Criminal Procedure Code, and how it came to be marked as Ex. 18. The evidence of the above-mentioned pleader (Mr. Dharurkar) makes the situation quite clear. It is an undisputable fact that Ex. 18 was not produced by any of the applicants. By a process almost similar to the one mentioned in *Janardhan Thakur v. Baldeo Prasad Singh* (1), Ex. 18 came on the file of the Court of the Sub-Divisional Magistrate, Pandharpur. And the aforesaid ruling lays down that a document so coming into Court is not one produced under S. 195 and hence no sanction under clause (c) is necessary."

In the case of *Janardhan Thakur v. Baldeo Prasad Singh* (1) there was a dispute as to the possession of immovable property between an auction purchaser and another claimant to the land. The latter produced a certain document before the police officer who was inquiring into the dispute. The officer filed it with his report and subsequently referred to it in his deposition. The party who had produced the document withdrew from the proceedings and the Magistrate, without referring to the document, recorded a finding that the possession was with the auction-purchaser. The latter moved the Magistrate to impound the document and to sanction the prosecution of his opponent. The latter resisted the application on the ground that sanction was not necessary. The auction-purchaser there-

upon filed a complaint against him under Ss. 463, 471 and 476, Indian Penal Code. The accused pleaded that sanction was necessary, but process was issued. The accused moved the High Court without having moved the Sessions Court, when it was held that it would be a strain of ordinary language to say that the document, which came into Court merely because it was attached to the police report prior to the proceeding was "produced" in the proceeding. Assuming, however, that it was "produced," the prosecution of the accused, who had no hand in its production, was not barred by reason of the absence of sanction. Mr. Justice Foster said (p. 138):—

"I do not see how the prosecution of a party who had no hand in its production, is barred by the absence of the sanction of the Court. We have been taken through a number of authorities, but in every case the party was criminally implicated, directly or by abetment, in the production."

Further on he says (p. 139):—

"In the present case the Court had no grievance against the petitioner. He neither produced the false document nor abetted its production. So in no way did he abuse the authority of the Court."

The Additional Sessions Judge then refers to *In Re Parameswaran Nambudri* (2) where Mr. Justice Tyabji said (P.681):

"Clauses (b) and (c) agree in some respects, but differ in this—that the offence is identified in clause (b) by reference to the fact that it has a direct connection with some proceedings in Court, viz., having been (i) committed in or (ii) in relation to the proceedings; whereas in clause (c) the offence has to be connected not with the proceeding, but (i) with a document produced or given in evidence in the proceedings; and (ii) by the fact that the document has been produced or given in evidence by a party to the proceeding."

We think that S. 195 (c) is wide enough to include any document produced or given in evidence in the course of a proceeding whether produced or given in evidence by the party who is alleged to have committed the offence or by any one else, and that the intention of the legislature in the framing of the Section, as it stands now, was to give authority only to the Court

(1) [1920] 5 Pat. L. J. 135=1 Pat. L. T. 129=21 Cr. L. J. 722=55 I. C. 288=(1920) P. H. C. C. 137

(2) [1915] 39 Mad. 617=18 M. L. T. 322=31 I. C. 161=16 Cr. L. J. 721.

in which a proceeding was pending to file a complaint in respect of documents which were produced or given in evidence before it. If there had been any intention to limit the provisions of the section to a document produced or given in evidence by a party to the proceeding, then it would have been a simple matter to insert words to make that intention clear. These words are not there. We can only construe the section as it stands. We think the Additional Sessions Judge was wrong in holding that the kararnama had not been produced or given in evidence in the proceedings before the Sub-Divisional Magistrate within the meaning of S. 195 (c), so that it was not necessary that he should make a complaint under S. 476 before a Court could take cognizance of the offence charged against the petitioners. The rule is made absolute by setting aside the order of the lower Court.

Coyajee, J.—I agree in holding that neither the language of S. 195, Criminal Procedure Code, nor the object of that enactment, requires us to restrict its operation in the manner contended for by the opponents in this case.

Rule made absolute.

★ 1925 BOMBAY 435

MACLEOD, C. J. AND COYAJEE, J.

Suryajirao Ganpatrao Jahajindar—Appellant.

v.

Sidhanath Dhonddeo Garud and others—Respondents.

First Appeal No. 46 of 1923, Decided on 12th February 1925, from the decision of the First Class Sub. J., Jalgaon, in Special Suit No. 431 of 1920.

★ (a) *Lim. Act, Art. 62—Suit to recover money paid under protest—Limitation starts not from the demand of payment but from the date of payment.*

Although the fact that a demand for increased payment might give rise to a cause of action to enable the plaintiffs to seek for a declaration that that particular demand was unauthorized, it does not affect their right to file a suit in which the relief claimed is on a different cause of action arising from the payment under protest made by them on the demand under S. 153 of the Bombay Land Revenue Code. [P. 416, O. 1]

(b) *Bombay Land Revenue Code, S. 217—Section does not affect contractual rights arising before the Survey.*

With regard to an unalienated village it would be competent to Government to enter into

contractual relationship with tenants or occupants. They might acquire fixity of tenure and fixity of rent. Where the village had been alienated and the alienee had entered into a contract with a person granting not only fixity of tenure but also fixity of rent, there is nothing in the provisions of S. 217 which would enable the alienees of the village to avoid their contractual liability; therefore, they could not enforce against their permanent tenants the payment of the assessment levied on occupancy land. [P. 431, C. 2.]

G. N. Thakor and D. C. Virkar—for the Appellant.

K. H. Kelkar—for Respondents.

Macleod, C. J.—The plaintiffs sued to obtain a declaration that the defendant was not entitled to claim more than Rs. 87-9-11 per year fixed by the original agreement, and to recover from the defendant Rs. 2,649-12-4 wrongfully recovered by the defendant with interest thereon and further interest till realisation, and for a permanent injunction to the defendant restraining him from demanding more than Rs. 87-9-11 per year.

The plaintiffs' title depended upon two documents, Exhibits 74 and 75. Those documents, we think, gave the plaintiffs' predecessors-in-title the right to hold the land mentioned therein as permanent tenants on payment of the rents fixed by those documents. In 1911 and 1912 the defendant's property was being managed by the Court of Wards, and a notice of demand was served upon the plaintiffs by the Collector on behalf of the Court of Wards claiming a higher rent or assessment to be levied on the plaintiffs' land. An objection was raised in 1914 by the receiver of the plaintiffs' property claiming that the Court of Wards had no right to make such a demand, and threatening that a suit would be filed for a declaration restraining the Collector from making such a demand. Nothing further occurred until 1916. A notice was then issued by the Collector under S. 153 of the Land Revenue Code claiming the sums of Rs. 2,649 and Rs. 92-4-0 being the land revenue and local fund cess on plaintiffs' survey numbers from the years 1911 to 1916 and giving notice that if the arrears were not paid the Collector proposed to declare the holding to be forfeited. The plaintiffs paid under protest and filed this suit on November 20, 1919. The first issue raised was whether Government was a necessary party.

suit. We think that the Judge below was right in holding that this property was at the time of the notice under the superintendence of the Court of Wards, that the claim was not made by Government but by the Collector acting on behalf of the defendant's estate, that the Government was not concerned with the recovery of the demand from the plaintiffs, and that therefore Government was not a necessary party to this suit.

The findings on the 2nd and 3rd issues would follow that finding.

The next question is one of limitation. We think that the Judge was right in holding that time began to run from the date of the payment made by the plaintiffs under protest. It was contended that time began to run when the demand was first made. But although the fact that the demand for increased payment so made might have given rise to a cause of action to enable the plaintiffs to seek for a declaration that that particular demand was unauthorised, it would not affect their right to file the present suit in which the relief claimed was on a different cause of action arising from the payment under protest made by them on the demand under S. 153, Land Revenue Code.

The only question left then is whether the plaintiffs were permanent lessees of the defendant, and whether the rent was liable to be enhanced on the defendant's demand. We think it is beyond doubt that the letters Exhibits 74 and 75 created permanent tenancies in favour of the plaintiffs' predecessors-in-title. At that time the village was unsurveyed and the effect of those documents was to create a permanent tenancy in favour of the plaintiffs' predecessors-in-title at the fixed rents mentioned therein. The defendant expressly agreed that no further demand would be made against the tenant beyond the amounts so fixed. It was contended that S. 217 of the Land Revenue Code after the survey had been introduced into this village would affect the rights of the permanent tenants to avoid any enhancement of their rent. It is difficult to see how the provisions of S. 217 can affect contractual rights arising before the introduction of the survey. It states:—

"When a survey settlement has been introduced, under the provisions of the Code of 1900, any law for the time

being in force, into an alienated village, the holders of all lands to which such settlement extends shall have the same rights and be affected by the same responsibilities in respect of the lands in their occupation as holders of lands in unalienated villages have, or are affected by, under the provisions of this Act, and all the provisions of this Act relating to holders of land in unalienated villages shall be applicable, so far as may be, to them."

Now with regard to an unalienated village it would be competent to Government to enter into contractual relationship with tenants or occupants. They might acquire fixity of tenure and fixity of rent. In this case as the village had been alienated, the alienee had entered into a contract with the plaintiffs' predecessors-in-title granting not only fixity of tenure but also fixity of rent, and there is nothing in the provisions of S. 217 which would enable the alienees of the village to avoid their contractual liability, so that they could enforce against their permanent tenants the payment of the assessment levied on occupancy land. We think then the plaintiffs had acquired rights as permanent tenants against the inamdars which were not affected by the introduction of the survey into this village, and that they were entitled to the decree given to them by the trial Court. The appeal then will be dismissed with costs.

Appeal dismissed.

1925 BOMBAY 436

CRUMP, J.

Bai Kasturbai—Plaintiff.

v.

Vanmalidas Lakmidas—Defendant.

O. J. J. Suit No. 4310 of 1923, Decided on 5th March 1925.

(a) *Criminal P. C., S. 476—Proceedings heard by one Judge—Direction can be granted by another.*

A Judge of the High Court can grant a direction to prosecute under S. 476, although the matter out of which the action arose was heard by another Judge of the Court. [P. 438, C. 1.]

(b) *Criminal P. C., S. 476—Notice though not legally necessary is expedient.*

As a matter of strict law no notice would be necessary to a person before taking the proceedings.

ings against him under the law which now exists, but it is right that he should have notice. [P 437 C 2]

R. D. N. Wadia and Kanga—for Plaintiff.

Lalji for Thomas Strangman—for Defendant.

Crump, J.—This matter arises out of a suit No. 4310 of 1923, which was heard by Mulla, J., and disposed of by him on July 3, 1924. The suit was one by the plaintiff Kasturbai for a dissolution of partnership and for partnership accounts. Among the other defences pleaded by the defendant, he said that there was no partnership between himself and Kasturbai, and that a certain agreement evidencing the partnership had not been acted upon. The learned Judge who heard the suit came to a conclusion adverse to the defendant upon that issue, and, in the course of doing so, he expressed himself very strongly as to the conduct of the defendant in the suit. The following passage from his judgment shows his opinion upon this matter:—

"As regards the defendant I have no hesitation in saying that it is rarely that one comes across a witness of his type, who is not ashamed in telling a series of lies barefacedly in this Court. The story about his brother being the owner I hold is a false invention.

The suit ended in a decree in favour of the plaintiff. The plaintiff moved for a rule to the defendant to show cause why sanction for his criminal prosecution should not be given and why he should not be prosecuted criminally for having made on oath statements which were false and which he knew or believed to be false and for having given intentionally false evidence on oath in the proceedings in the said suit. The rule was issued in these terms, and has now come before me for hearing and disposal. It is unfortunate that the day on which this rule was issued was the last day Mulla, J. held office as a Judge of this Court.

Before coming to the merits of this matter I must notice two preliminary points that have been urged by Mr. Lalji on behalf of the defendant. In the first place it is urged that the rule is not in the correct form. It is no doubt true that the procedure by way of sanction for prosecution is no longer in force since the amendment of the Code of Criminal Procedure in 1922; but this is a matter of form and

not of substance, and as a matter of strict law no notice would be necessary to the defendant before taking proceedings against him under the law which now exists. It is not thus open to him to complain of the formal defect of this rule, and even if he is strictly entitled to notice, before the Court takes action against him—and no doubt it is right that he should have notice—still this rule fully informs him as to the nature of the proceedings sought to be taken against him. Therefore there is no substance in this point.

The second point raised is that this Court has no jurisdiction to dispose of a rule granted by Mulla, J. Several decisions have been cited upon that question, but the effect of them is very materially affected by the amendment of the Code of Criminal Procedure since the date when the decisions were pronounced. As the law now stands there is no question of giving sanction to any private person to prosecute and old S. 195 has now been repealed and S. 195 now enacts that no Court shall take cognisance of certain offences without a complaint in writing of the Court in or in relation to which the offence was committed or some other Court to which such Court is subordinate. But before proceeding to the cases it is necessary to turn to S. 476 of the Criminal Procedure Code. That Section has made a very considerable change not merely as regards sweeping away the procedure as to applying for sanction but also with regard to those cases where the Court could take summary action under S. 476, as it formerly stood. S. 476, clause (1), with which I am here concerned, runs as follows:—

"When any Civil, Revenue or Criminal Court is, whether on application made to it in this behalf or otherwise, of opinion that it is expedient in the interests of justice that an enquiry should be made into any offence referred to in S. 195, sub S. (1), clause (b) or clause (c), which appears to have been committed in or in relation to a proceeding in that Court, such Court may, after such preliminary inquiry, if any, as it thinks necessary, record a finding to that effect and make a complaint thereof in writing signed by the presiding officer of the Court."

The question, therefore, which arises is the meaning of the word 'Court' as used by the Legislature in this connection. In

my opinion, 'Court' for the purposes of this application must be taken to mean 'High Court' and if that is so—as any Judge of the High Court has power to exercise the powers of the High Court—it would follow that any Judge could dispose of an application under S. 476 whether the matter out of which the action arose was heard by him or some other Judge of the Court. No doubt as a matter of convenience that would seldom be done, but where, as in the present cases the Judge has ceased to hold office, I see nothing in the language of the Section to preclude any Judge from disposing of such a matter as is now before me. As I have stated the result of the amendment of the Criminal Procedure Code robs decisions upon the terms of the former Code of much of their significance; still there are three decisions which may be cited as bearing out the view which I have expressed.

The first of these is *Emperor v. Molu Fuzla Karim* (1) in which it was held, where a Judge of the Small Causes Court had heard the suit and had ceased to hold office, it was open to another Judge of the same Court to deal with the grant of sanction for prosecution arising out of the suit. This is really analogous to the present case, for procedure under S. 476 as it now stands is very close to the old procedure under S. 195 for the grant of sanction. Again in *Bihudur v. Eraditullah Mallick* (2) it was held that in S. 476 as it stood before the amendment, there was nothing to warrant their lordships from withholding from the word 'Court' its natural meaning with the sense of continuity thus implied, notwithstanding any change of officers. The learned counsel for the defendant relied upon the Full Bench ruling in *Begu Singh v. Emperor* (3), but this is overruled by the case last cited, and it is also obvious from a reference to the Section itself as it stood and it now stands that the main grounds on which the decision rests are no longer in force. The learned Judges relied on the words "committed before it or brought under its notice in the course of a judicial proceeding" which are no longer to be

found in the Section, and, secondly, they thought that the case was one in which it was proper to have recourse to the alternative procedure under S. 195, which is no longer open, and further they appear to have laid stress on the fact that under S. 476 there was no appeal from the action of the Court, but an appeal is provided now by S. 476 (b) of the amended Criminal Procedure Code. In my opinion, therefore, there is no want of jurisdiction, and I am glad to come to that conclusion for any other conclusion, in my opinion, would lead to inconvenient results.

Passing now to the merits of the case, I would observe at the outset that what I have to do here is to consider after such preliminary enquiries as appear necessary, whether it is expedient in the interests of justice that an enquiry should be made into any offence referred to in S. 195, sub-s. (1), clause (b) or clause (c). If I come to the conclusion that it is expedient, then a finding to that effect must be recorded, and upon such finding a complaint in writing must be made to the Magistrate.

I am not here to decide whether or not the defendant is guilty of the offence of giving false evidence, but I have to consider whether in the interests of justice there is a *prima facie* case, which ought to be enquired into.

Now I have heard the evidence upon the merits and I do not consider that it is my function to state at any considerable length the reasons which actuated me in the conclusions to which I have come. I do not think that it is desirable in any case to do so. For what we are considering here is merely a step *in limine*. In the first instance I naturally attach very great weight to the expressed opinion of the learned Judge who heard the suit, which I have set out above, which shows that he obviously considered the case was a proper one in which a rule should issue. I also find it is extremely difficult to reconcile the defendant's interpretation of Ex. A, the document of partnership, with the contents of Ex. F, another document which he also admits. This latter document was given pursuant—so it is expressed—to the writing made between Bai Kasturbai, the plaintiff in the suit, and the defendant Vanmalidas Lakhmidas, and if that is so it is difficult to understand how there can be no partnership. In addition to that there is

(1) [1903] 33 Cal. 193=3 Cr. L. J. 355.

(2) [1910] 37 Cal. 612=14 C. W. N. 799=12 C. L. J. 45=6 I. C. 801=11 Cr. L. J. 407 (F. B.)

(3) [1907] 34 Cal. 551=11 C. W. N. 568=5 C. L. J. 508=5 Cr. L. J. 398=2 M. L. T. 293 (F. B.)

positive evidence given by Bai Kasturbai, her husband, and one Chandulal that the partnership was in fact acted upon, and that evidence was believed by the learned Judge who heard the suit. It has also been made to appear to me that the defendant's brother Dharsey, who, according to his story, was the sole owner of the partnership business, was in fact nothing of the kind, but at most a paid servant of the firm. There are also affidavits, no doubt subsequent in date to the decision of the suit, in which the defendant has himself stated that he and Kasturbai were partners. Had he confined himself to stating that the High Court had decided that point of partnership against him, little importance could be attached to these affidavits, but he goes further than that and deliberately says that he and Kasturbai were partners.

Having regard to all these matters it appears to me that this is a case in which in the interests of justice it is expedient that an enquiry should be made into offence under S. 193 of the Indian Penal Code or such other Sections as may be applicable, committed in the course of the suit in question, and I therefore record a finding to that effect. The action to be taken upon this finding is of course to be taken by the Court itself, and a complaint will be drafted and sent to the Magistrate for disposal.

I direct that the words "why sanction for the criminal prosecution of the said defendant Vanmalidas Lakhmidas should not be given" should be deleted from the rule.

In other respects rule made absolute with costs.

Rule made absolute.

1925 BOMBAY 439

MACLEOD, C. J., AND COYAJEE, J.

Govind Vasudeo Kulkarni—Appellant.

v.

Narayan Balwant Kulkarni and another—Respondents.

Second Appeal No. 805 of 1923, Decided on 5th February 1925, from the decision of the D. J., Ahmednagar, in Appeal No. 140 of 1922.

Prov. Small Causes Courts Act (9 of 1887), 2nd Sch., Art. 13—Kulkarni Watan—Commutation

allowance—Suit for share in allowance does not fail under Art. 13.

A suit by a co-sharer to recover his share in a commutation allowance of a Kulkarni Watan is a suit for money had and received, and does not fall under Art. 13. [P. 439, C. 2]

*P. V. Kane—*for Appellant.

*P. B. Shingne—*for Respondent No. 1.

Macleod, C. J.—We think this case comes within the decision in *Dinodhar Gopal Dikshit v. Chintaman Balkrishna Karci* (1) cited with approval in *Bhikaji Hari v. Kulkarni* (2). In the latter case the plaintiff sued the defendant alleging that they were both sharers in the Kulkarni Watan, and that the defendant had received profits of the office and had not paid to the plaintiff her share for a certain number of years. The defendant admitted that he had received the profits, and admitted that the plaintiff was a sharer, but only disputed the *quantum* of her share. The suit was held to be a suit for money had and received by the defendant for the use of the plaintiff, and was a suit of a Small Cause Court nature in respect of which no second appeal lay.

In this case we are asked to hold that the suit came within Article 13 of the second schedule of the Provincial Small Causes Courts Act, as it was a suit to enforce payment of the allowance or fees respectively called *malikana* and *hakk*, or of cesses or other dues when the cesses or dues are payable to a person by reason of his interest in immovable property, or in an hereditary office or in a shrine or other religious institution. This is not a suit to enforce payment of the allowance for which the Kulkarni Watan in question was commuted. That allowance has been recovered from its source, and this is only a dispute between persons claiming to divide it. The plaintiff was entitled to sue the defendant for money had and received. Consequently there was no appeal to the District Court if the trial Judge had Small Cause Court powers, and if he had not such powers then, although the District Court was competent to hear an appeal, there would be no second appeal. In any event the second appeal should be dismissed with costs in favour of respondent No. 1.

Appeal dismissed.

(1) [1893] 17 Bom. 42.

(2) [1913] 37 Bom. 703=21 I. C. 181=15 Bom. L. R. 803.

★ 1925 BOMBAY 440

MACLEOD, C. J., AND COYAJEE, J.

Ganappa Putta Hegde—Appellant.

v.

Hammad Saiba—Respondent.

Second Appeal No. 640 of 1923, Decided on 10th February 1925, from the decision of the District Judge, Karwar, in C. A. No. 157 of 1922.

★ (a) *Civil P. C., S. 102*—Suit as framed not a Small Cause—Plaintiff omitting a portion of claim subsequently—Suit does not change its character.

Where a suit as framed is not a suit of a Small Cause nature, it does not attain that character, if the plaintiff in the course of hearing gives up a part of his claim. [P. 441, C. 1.]

★ (b) *T. P. Act, S. 55*—Purchaser obstructed in getting possession—Suit for refund of purchase money is governed *Lim. Act, by Art. 116—Limitation Act, Art. 116*.

Where the defendant covenanted that he had a good title to the property sold, and in return for the sale-deed received a certain price, but the plaintiff was obstructed in obtaining possession of the property and therefore sued defendant for return of the purchase money,

Held: that the suit was governed by Art. 116 and the cause of action arose on the date of sale. [P. 441, C. 2.]

★ (c) *Lim. Act, Art. 116*—"Compensation" includes a sum certain.

The word "compensation" in Art. 116 need not be restricted to a claim for unliquidated damages, and can be held to include a claim for a sum certain. 44 C. 759 P. C. *Foll.* [P. 442, C. 1.]

★ (d) *Lim. Act, Art. 116*—Words "Express or implied" should be read in Art. 116.

Per Coyajee, J.—The words "express or implied" contained in Art. 115 are also intended to be read into Art. 116. 45 Bom. 955 *Ref.*

[P. 442, C. 2.]

G. P. Murdeshwar—for Appellant.*S. S. Patkar*—for Respondent.

Facts.—There were five cousins, Bommanna, Timmanna, Puttayya and Subbayya, sons of Bomma Hegde, and Ganapa Manj Hegde, living separate. Ganapa died leaving a widow Venkamma as heir to his property. Puttayya and Subbayya died during her life-time, so that on the death, of Venkamma, Bommanna and Timmanna succeeded to her property as reversioners. Puttayya's son, representing that he was entitled to half the property of Ganappa, sold it to the plaintiff in this suit for Rs. 400 on April 4, 1915. Rs. 150 were paid in cash, and for the balance the plaintiff passed a mortgage on certain of his properties.

The plaintiff, when he was unable to get

possession owing to the obstruction of Bommanna and Timmanna, purchased the land from them and obtained possession on April 4, 1921. He sued Puttayya's son to recover the Rs. 150 and to obtain a declaration that the mortgage bond was satisfied. The defendant pleaded that he did not make any representation to the plaintiff, that the plaintiff bought agreeing to take all risks, and that the suit was not in time.

As the plaintiff had not paid the necessary Court fees with regard to the declaration sought for that the mortgage bond had been satisfied, he gave up his claim for the declaration.

The trial Judge held that the defendant had no title to the land sold by him, that he was not induced to sell on the representation alleged to have been made by the plaintiff, that this suit was filed in time, and passed a decree for Rs. 150 with costs and future interest at six per cent.

The defendant had contended that the suit was one for relief on the ground of fraud, and that as the plaintiff had become aware of the fraud, more than three years before the suit was filed, the suit was barred applying Article 95 of the second schedule of the Indian Limitation Act. The learned Judge considered that it was a suit for compensation for breach of a contract in writing registered, to which Article 116 was applicable. Though there was no express covenant in the deed to make compensation for want of title, such a covenant could be implied from the representation made by the defendant.

In appeal the District Judge held that the sale was void *ab initio*, that under S. 55 (2) of the Transfer of Property Act there was an implied covenant of title in the sale-deed, and that as it was registered, a suit for the recovery of the purchase money fell under Article 116, the starting point for limitation being the date of the sale as no possession had been obtained.

On the issue whether plaintiff agreed to take the risk of not getting possession the District Judge held that the defendant had not proved what he had alleged in his written statement. Accordingly the appeal was dismissed.

Macleod, C. J.—[His Lordship after stating facts as set out above proceeded.]

In second appeal it was first contended

that no appeal lay as the suit was of a Small Cause Court nature, the plaintiff having given up his claim for declaration asked for in the plaint.

We do not think that this contention is sound. The suit as framed was not a suit of a Small Cause Court nature, and it did not attain that character because the plaintiff gave up his claim to the declaration.

The question whether this is a suit for compensation for breach of a contract in writing registered is more difficult. It has been argued on the authority of *Hanuman Kamat v. Hanuman Mandur* (1) that if a vendor without title sells to a purchaser and receives the purchase money a suit for the recovery of the purchase money falls under Art. 62 if the purchaser does not obtain possession, and under Art. 97 if he does obtain possession. The purchaser has brought a worthless piece of paper and consequently, when endeavouring to recover the price paid, he is not suing for compensation for breach of a contract. But it must be admitted that in the case referred to the question whether the suit could be considered as a suit for compensation for breach of a contract does not seem to have been considered. Their Lordships said at p. 126 :

"If there never was any consideration, then the price paid by the appellant was money had and received to his account by Dowlut Mandur. But their Lordships are inclined to think that the sale was not necessarily void, but was only voidable if objection were taken to it by the other members of the joint family. If so, the consideration did not fail at once, but only from the time when the appellant endeavoured to obtain possession of the property, and being opposed, found himself unable to obtain possession. There was then, at all events, a failure of consideration, and he would have had a right to sue at that time to recover back his purchase money upon a failure of consideration; and, therefore, the case appears to them to be within the enactment of Art. 97."

In *Subbaroya v. Rajagopala* (2), A, who had a title to certain immovable property voidable at the option of C, sold

(1) [1892] 19 Cal. 123=18 I. A. 158=6 Sar. 91. (P. C.)

(2) [1915] 38 Mad. 887=15 M. L. T. 240=23 I. C. 570=(1914) M. W. N. 376.

it to B and put B in possession thereof. C then brought a suit against A and B and got a decree and obtained possession thereof in execution. It was held that B's cause of action for the return of the purchase money arose not on the date of the sale but on the date of his dispossession, when alone there was a failure of consideration, and that the Article applicable was Art. 97 of the Indian Limitation Act. The only question argued was at what date did the cause of action arise. On this question the Judge said a large number of cases were quoted which could be roughly classified under three heads: (a) where from the inception the vendor had no title to convey and the vendee had not been put into possession of the property, (b) where the sale was only voidable on the objection of third parties and possession was taken under a voidable sale, and (c) where though the title was known to be imperfect the contract was in part carried out by giving possession of the properties. In the first class of cases the starting point of limitation would be the date of the sale. Although S. 55 (2) of the Transfer of Property Act was referred to, it does not appear to have been argued that Art. 116 was applicable; the case was held to come within class (b) and Art. 97 was applicable.

In *Arunachala v. Ramasami* (3), the suit was filed in 1910 on a sale-deed of 1904. It turned out at the trial that at the time of the sale the first defendant had no title to convey. The plaintiffs then pressed their claim to recover the consideration money, to which the defendant pleaded the bar of limitation. The District Judge held the claim came under Art. 62 or Art. 97. The High Court held that it came under Art. 116 as a covenant for title was implied in the conveyance by S. 55 (2) of the Transfer of Property Act. It does not appear from the report whether the plaintiffs had got possession of the property sold.

It may be taken, therefore, that the defendant covenanted that he had a good title to the property sold, and in return for the sale-deed received a certain price. If the plaintiff can be said to be suing for compensation for breach of that covenant then Art. 116 is applicable. Whether that Article applies to suit for debts or

(3) [1915] 38 Mad. 1171=1 L. W. 849=27 M. L. J. 517=25 I. C. 618=16 M. L. T. 397.

sums certain due upon registered instruments was considered in *Lalchand Nanchand v. Narayan Hiri* (4) and the Court held that there was a long series of cases in which that question had been decided in the affirmative, so that it accepted that body of authority. The Privy Council in *Tricomlas Cooverji Bhoja v. Gopinathji Thakur* (5) accepted the interpretation so often and so long put upon the statute by the Courts of India, and thought that the decisions could not be disturbed. Therefore the word "compensation" in Art. 116 need not be restricted to a claim for unliquidated damages, and can be held to include a claim for a sum certain as in this case. The appeal is dismissed with costs.

Coyajee, J.—I agree in holding that this second appeal is competent, but that it fails on the ground that the suit which has given rise to this appeal falls within Article 116 of the Indian Limitation Act. The plaintiff brought the suit for the recovery of his purchase-money. On April 4, 1915, the defendant executed the sale-deed in question in favour of the plaintiff. Admittedly, the vendor had no title to the land which he purported to convey; and the vendee had not been put in possession of the land. The sale is consequently void *ab initio*. The sale-deed, however, was duly registered, and on the face of it a *prima facie* title was secured. For it is enacted by S. 55, sub-Section (2) of the Transfer of Property Act—which applies to this case—that in the absence of a contract to the contrary, the seller shall be deemed to contract with the buyer that the interest which he professes to transfer to the buyer subsists and that he has power to transfer the same. Here, then, a covenant for title is implied, there being—according to the findings of the lower Courts—no contract to the contrary. The plaintiff's suit which is instituted within six years of the date of the sale is not barred by the law of limitation if Article 116 applies. In my opinion it is a suit for "compensation for the breach of a contract in writing registered" and

is governed by that Article: *Arunachala v. Ramisami*, (3). The expression "compensation for the breach of a contract," used in that Article, is not limited to a claim for unliquidated damages, but applies also to a claim for payment of a sum certain: *Tricomlas Cooverji Bhoja v. Gopinathji Thakur* (5). It is true that Art. 116 does not in terms speak of a contract "express or implied," and here we have an implied contract only. But I agree with the opinion expressed by Fawcett, J., in *Multinul v. Bulhumal* (6) that the terms of that Article are sufficiently wide to include a case of the present kind, and that the words "express or implied," contained in Art. 115, are also intended to be read into Article 116. The starting point of limitation in a suit of this nature is the date of sale, and the plaintiff's claim to recover back his purchase-money was, therefore, made within the statutory period.

Appeal dismissed.

(6) [1921] 45 Bom. 955=61 I. C. 70=23 Bom. L. R. 325.

1925 BOMBAY 442

MACLEOD, C. J. AND COYAJEE, J.

The Viramgam Spinning and Manufacturing Company, Limited—Appellant.

v.

The Industrial Bank of Western India, Limited—Respondent.

First Appeal No. 366 of 1924, Decided on the 17th February 1925, against the decision of the Dt. J., of Ahmedabad in Miscellaneous Appeal No. 134 of 1924.

Companies Act (1913), S. 202—Application under S. 153 by Company which is not being wound up—Order on application not appealable.

There is no appeal under S. 202 of the Act from an order made on an application by the company under S. 153 which is not in the course of being wound up. [P. 443, C. 1.]

Binning and Ratanlal Ranchhodas—for Appellant.

G. N. Thakor and M. K. Thakore—for Respondent.

Macleod, C. J.—We think that this appeal is not competent as the order was made by District Judge, not in the winding-up of the company, but on the application of the company itself. There are two classes of orders which can be

(4) [1913] 37 Bom. 656=21 I. C. 315=15 Bom. L. R. 836.

(5) [1916] 44 Cal. 759=44 I. A. 65=1 Pat. L. J. 262=15 A. L. J. 217=5 L. W. 654=25 C. L. J. 279=32 M. L. J. 357=21 M. L. T. 262=21 C. W. N. 577=(1917) M. W. N. 363=39 I. C. 156=19 Bom. L. R. 450 (P.C.)

made under S. 153 of the Indian Companies Act, the first, while the company is in existence, which can be made on an application either by the company or by a creditor or by a member of the company, the second after a winding-up order has been made, which can be made on an application by the liquidator. It is only if the order is made in the course of the liquidation by the Court that an appeal lies under S. 202 of the Act. As this order was made on an application by the company which is not in the course of being wound up, there is no provision in the Act which provides for such an order being appealable. The appeal, therefore, must be dismissed with costs in favour of respondent No. 1.

Appeal dismissed.

★ 1925 BOMBAY 413

MACLEOD, C. J. AND COYAJEE, J.

Mulchand Manaji Marwadi—Appellant.
v.

Jamanbi Abdul Kibir Siheb Kaji and others—Respondents.

Second Appeal No. 643 of 1923, Decided on the 27th February 1925, from the decision of the D.J. Bijapur, in appeal No. 39 of 1922.

★ (a) *Limitation Act, Art. 182—Step-in-aid—Oral application to pay money lying in Court is a step-in-aid.*

An application to the Court to pay out money in satisfaction of a decree is a step-in-aid of execution. 22 B. 340 *Foll.* Such an application need not be in writing. [P. 413, C. 2]

(b) *Evidence Act, S. 114 Ill. (f)—An Application can be presumed to have been made if facts justify presumption.*

Where the facts of a particular case can form a foundation for a fair presumption that an application was made, then the Court would be entitled to presume that it was made. 22 Bom. 722 *Rel. on.* [P. 413, C. 2, P. 414, C. 1].

G. P. Murdeshwar—for Appellant.

H. B. Gumaste—for Respondents.

Macleod, C. J.—Two questions arise in this second appeal, (1) whether an application to the Court to pay out money in satisfaction of a decree can be a step-in-aid of execution; (2) whether on the facts of this case the Court can presume that an oral application was made by the judgment-

creditors on April 13, 1918, for payment out to them of the sale proceeds of the property deposited in Court. It was decided in *Bipuchand v. Mugutrao* (1) that an application by a judgment-creditor for the payment to him of money, which has been paid into Court on his account in execution of his decree, is an application to the Court to take a step-in-aid in execution of the decree within the meaning of Article 179 of Schedule II of the Indian Limitation Act. We see no difference between money paid into Court to satisfy a decree and money lying in Court as a result of a sale in execution of the decree. We think, therefore, that if an application for payment out was made, it was a step-in-aid of execution. Such an application need not be in writing. The question is whether we could presume that such an application was made on April 13, 1918. On that day the pleader of the judgment-creditors was present. A report had been received from the Nazir that Rs. 650, sale proceeds of property sold, were with him. Exhibit 54 was a list of bidders at auction. Ex. 53 was a proclamation of sale, and Ex. 55 was the memo. of publication. The Nazir was ordered to hand over the money to the pleader for the judgment-creditors and report having done so. This order was passed below. Ex. 52 was the warrant of sale issued on January 18. It is quite true that the *Roznam* does not state in so many words that the pleader of the judgment-creditors made an application to the Court that the sale proceeds should be paid out to him, and it is contended for the respondent that as the order made by the Court could have been made without such an application, one was not entitled to presume that an application was made by the pleader for the judgment-creditors. Against this the appellant relies on *Trimbak v. Kashinath* (2), where it was held that where an order made in aid of execution is of such a nature that the Court would not have made it without an application by the judgment-creditor it may be presumed that due application had been made for it. We would prefer to go further and say that where the facts of a particular case can form

(1) [1898] 22 Bom. 340.

(2) [1893] 22 Bom. 722.

a foundation for a fair presumption that an application was made, then the Court would be entitled to presume that it was made. On the facts disclosed in the *Roznama* of April 13, 1918, we think it is fair to presume that the pleader of the judgment-creditors made an application to the Court that the sale proceeds should be paid out to him. The present *Darkhast*, which was presented on April 13, 1921, would then be in time.

We, therefore, allow the appeal and direct the *darkhast* to proceed. The appellants to have their costs in this Court and in the lower appellate Court. Costs in the trial Court to be costs in the *darkhast*.

Appeal allowed.

1925 BOMBAY 444

MACLEOD, C. J., AND COYAJEE, J.

Ghanshiram Baluram—Applicant.

v.

Misrilal Chunilal—Opponent.

Civil Extraordinary Application No. 86 of 1921, Decided on 5th March 1925, against an order of the Joint Sub-J., Dhulia, in Suit No. 276 of 1919.

(a) *Lim. Act, Art. 164*—*Ex parte decree*—*Application to set aside*—*If applicant had been duly served Limitation runs from the date of decree.*

An application to set aside an *ex parte* decree must be made within thirty days of the date of the decree and not of the date on which the applicant comes to know of the decree, when he is proved to have been served with the summons. [P. 445, C. 1]

P. V. Kane—for Applicant.

K. H. Kelkar—for Opponent.

Macleod, C. J.—The present applicants filed suit No. 40 of 1919 in the First Class Subordinate Judge's Court at Dhulia against the present opponent Misrilal Chunilal and another person, against whom afterwards the claim was withdrawn. Summons was served on the opponent on 10th February 1919. He did not appear at the hearing though duly served, and an *ex parte* decree was passed against him on 15th April 1919, for Rs. 2,366-8-0. The opponent then

filed suit No. 276 of 1919 on 16th July 1919, in the Dhulia Court against the present applicants for a declaration that the *ex parte* decree obtained by the petitioners against him in suit No. 40 of 1919 was obtained by fraud and misrepresentation, and that he came to know of the decree on 4th July 1919. Two preliminary issues were raised: (1) whether plaintiff (Misrilal) proved that the service of summons on himself as defendant in suit No. 40 of 1919 was effected fraudulently as alleged; (2) if not, then whether plaintiff can be allowed to prove that the decree in suit No. 40 of 1919 was obtained by using fabricated documents and by suppression of evidence. The Court held that a finding on the first issue was not necessary, and on the second it held that the plaintiff could be allowed to prove that the decree in suit No. 40 of 1919 was obtained by using fabricated documents and by suppression of evidence.

The Judge then went on to consider whether the decree had been obtained by using fabricated documents and by suppression of evidence, and although he found it was not necessary to find whether the summons was fraudulently served, he did go into that question and concluded that no fraud could be brought home to the present defendant in respect of the sending of the summons to Falodi by registered post. The present plaintiff, after he was served with the summons by registered post, wired to the Court for an adjournment on the ground, as he stated, that there was a marriage ceremony at his house and that further he was engaged in a criminal matter. The Judge further found that there was no fraud or misrepresentation on the part of the present applicants. He then continued:—

“If the suit were treated as an application to set aside the *ex parte* decree, the plaintiff would be entitled to have it set aside. There is, however, no specific prayer to that effect. I, therefore, allow plaintiff an opportunity to say whether he wishes to treat this suit as an application and to be decided accordingly.”

The present suit was instituted within a month after plaintiff got knowledge of the decree in suit No. 40 of 1919. The plaintiff then applied that the suit should

be treated as an application to restore the suit to the file by setting aside the *ex parte* decree. That was granted and costs were directed to abide the result. That was by itself an extraordinary order to make, because it would mean that if the applicants eventually lost the suit, they would have to pay the costs of their successful defence against the opponent charging them with fraud. But the real question is whether the Judge had jurisdiction to treat the plaint in the suit as an application to set aside an *ex parte* decree under Order 9. It was never suggested that the opponent, if he could not substantiate the charge of fraud, had not been served with summons. The Court never considered that question, and it had never been raised by the opponent in those proceedings. But the Judge considered the time from which limitation started as the date on which the plaintiff got knowledge of the decree in suit No. 40 of 1919. That was a wrong conclusion, considering the Judge must be taken to have held, in the absence of fraud, that the summons was duly served. He said:

"The present plaintiff actually wired to the Court for an adjournment. This fact shows that the present plaintiff was served with the summons in the suit and accepted the service, and the Court was not misled by any representation on the part of the defendant."

Therefore, it is clear that limitation started from the date on which the decree was passed. The Judge, therefore, had no jurisdiction to entertain the application after thirty days. This rule must be made absolute and the order of the lower Court discharged with costs throughout on the opponent.

Rule made absolute.

★ 1925 BOMBAY 445

MACLEOD C. J. AND COYAJEE, J.

Bhagvanlal Chunilal—Appellant

v.

Bai Divali and others—Respondents.

Second Appeal No. 774 of 1923, Decided on 6th February 1925, from the decision of the First Class Sub-J. Ahmedabad in Appeal No. 139 of 1922.

★ *Hindu Law—Widow's Estate—Stridhan—Wife living separately from her husband—Property inherited from her father—Will by wife with husband's consent is valid.*

A Hindu wife, who lived separately from her husband nearly thirty or forty years, can dispose of by Will the property inherited from her father, even without her husband's consents. 30 Bom. 229 Construed. [P 446 C 1]

H. V. Divatia—for Appellant.

M. H. Mehta—for Respondents.

Macleod, C. J.—The original plaintiff to this suit was one Parshottam Hargovandas, who sued to recover from the defendants possession of the property in suit, alleging that his wife Bai Adat died on January 9, 1921, leaving behind her that property to which the plaintiff was the heir at law; that the defendants were withholding possession of same from him on the strength of an alleged will by Bai Adat; and that as the plaintiff had not consented to it, it was not operative.

The defendants went to trial on the issues whether the will by Bai Adat was valid, and whether the suit properties, or any of them, were other than *Saudayik stridhan* of the deceased Bai Adat. The trial Judge found that the will was valid, and that the property in suit was not *Saudayik Stridhan* of Bai Adat. He considered in the circumstances of the case that Bai Adat was entitled to dispose of such property by will, although her husband was alive because the will was not made during coverture, which was still understood to mean a state during which the wife was under the power of her husband, and as it was admitted that Adat was living separate and independently of her husband at her father's house for thirty or forty years till her death, she was not under coverture.

In appeal the Judge said:

"Bai Adat stayed with her husband Purshottam for a few years. She gave birth to four or five children who died long ago. Purshottam then married a second wife with the result that Bai Adat had to seek the shelter of her parents. She lived with her parents and in their house for about forty years prior to her death. During this time her husband never maintained her, nor did he ever care to know how she was doing. She seems to have been treated as an abandoned wife."

He agreed with the learned trial Judge that Bai Adat really got her father's property as his heir, and referring to the decision of *Bhau v. Raghunath* (1) said :

"The ruling quoted by the appellant lays down that it is not open to a wife to dispose of her stridhan property except *Saudayik Stridhan* without her husband's consent or permission during coverture. The principle on which the ruling is based is that females are always subject to the control of males even in a matter of disposition of their separate property. This condition of control can exist when the females reside with and are members of the family of the controlling male persons. If a husband abandons his wife and fails to fulfil the obligations enjoined by Hindu law to his wife for more than a generation, he cannot claim the right of control over the property she acquired in her paternal house. The law which gives a husband power of control over the person and property of his wife also presents corresponding obligations. If the latter are not discharged, the former must be treated as lost to a great extent. Bai Adat had virtually ceased to be a member of her husband's family. Her husband had, therefore, lost all control over her property and over her person to a great extent."

The appeal was, therefore, dismissed.

The correctness of that decision has been contested in second appeal. We do not dispute for a moment the principles of Hindu law as stated in *Bhau v. Raghunath* (1) with regard to the power of disposition by a wife over her non-*Saudayik stridhan*. But it is perfectly clear, as pointed out by the lower appellate Judge, that the texts which are referred to in that judgment contemplate quite a different state of facts from those which have been proved to exist in this case, and we cannot know what would have been laid down, supposing the possibility of a wife being separated from her husband for forty years could have been contemplated in those times. We think that the facts in this case are sufficient proof that although Bai Adat at law was still the wife of Purshottam, he had lost all rights of control over her, so as to lose also the right to validate any disposition which she might make by will of property inherited by her from her paternal relations. We think this decision is in consonance

(1) [1905] 30 Bom. 229 = 7 Bom. L. R. 936.

with the views which would prevail at the present day in the community. Both the Judges who heard the case in the lower Courts are Hindus, and we do not think that they would have decided the case, as they have done, if they thought that their decisions would in any way offend the sense of the Hindu community. We therefore, dismiss the appeal with costs.

Appeal dismissed.

1925 BOMBAY 446

MACLEOD, C. J., AND COYAJEE, J.

Keshav Krishna Kulkarni and others—
Defendants—Appellants.

v.

Shankar Mahadeo Kulkarni—Plaintiff
--Respondent.

Second Appeal No. 550 of 1923, Decided on 19th February 1925, from the decision of the Sub. J., 1st Class, Rahmagiri, in Appeal No. 45 of 1922.

★ (a) *Easements Act, S. 15—Easement of projecting branches of trees growing on one's land over the land of another cannot be acquired by prescription.*

The private nuisance caused by the overhanging boughs belonging to the trees of one neighbour to the owner of the land over which the boughs were overhanging does not create a "right" within the definition of "easement" in the Indian Easements Act, nor does the convenience to the owner of the tree, always changing in extent and position of space, become at any time so determinate that it could by any length of time be held to be enjoyed as "of right". There can be no such easement as can be acquired by prescription. 19 Bom. 420 *Foll.*

[P 447 C 2]

★ (b) *Easement Act, S. 18—Projecting branches of one's trees on another's land cannot be a customary easement.*

A custom in the village not to complain against the overhanging of coconut trees over neighbour's lands would not be reasonable and cannot be pleaded. It is indefinite and vague nor can there be customary easement under S. 18 of projecting the branches of trees growing on one's land over the land of another. 43 Bom. 164 *App.*

[P 448 C 1 2]

*A. G. Desai—*for Appellants.

*S. Y. Abhyankar—*for Respondent.

Macleod, C. J.—The plaintiff sued to obtain a permanent injunction ordering the defendants to see that the two palm trees and the jack-fruit tree growing in the defendants' land, or their leaves or any portion of them, did not overhang either the plaintiff's house or land, and to

obtain an order that these trees should be cut down by the defendants at their expense and that in default the plaintiff should be allowed to do so at the expense of the defendants, also for damages and costs.

The defendants raised many contentions in their written statement. The principal issues raised on the pleadings were:—

(1) Is the plaintiff entitled to have the defendants' palms and jack-tree (Nos. 1 to 3 in the map-Exhibit 18) removed?

(3) Is the plaintiff estopped from asking for the removal of the palms and jack-tree?

(4) Is the suit barred by limitation.

(5) Have the defendants any and what rights of easement with regard to the palms?

The trial Judge held that the plaintiff was entitled to have such portions of defendant's palm and jack-fruit-trees cut as overhung his property; that the plaintiff was not estopped from asking for the removal of the palms, and that as to the jack-fruit-tree the question of estoppel did not arise; that the suit was not barred by limitation; and that the defendants had no rights of easement whatever. Accordingly he directed the defendants to remove and cut off those portions of the two palms and one jack-fruit-tree which overhung plaintiff's land, failing which plaintiff was at liberty to cut them down at defendant's costs through Court. He awarded no damages to plaintiff but allowed proportionate costs against defendants.

In appeal the principal issues were:—

(3) Whether issue 5 framed in the lower Court is not comprehensive and does not include the right of customary easement claimed by the defendants.

(4) Whether the easements claimed by the defendants are proved.

(5) Whether plaintiff is entitled to have the two palms and one jack-tree cut so far as they overhung plaintiff's site and house.

The Judge held on issue No. 3 that issue No. 5 in the trial Court was sufficiently comprehensive so as to include the customary easement set up by defendants. On issue No. 4 the Judge held that the easements claimed by the defendants were not proved, and on issue No. 5, that the plaintiff was entitled to have the two palms and one jack-fruit-tree cut so far as they overhung plaintiff's site and house.

It has been argued in appeal before us that the defendant was entitled to an easement by local custom by which his neighbour was bound to suffer his land to be overhung by the defendant's trees.

In *Hari Krishna Joshi v. Shankar Vithal* (1) this Court decided that the private nuisance caused by the overhanging boughs belonging to the trees of one neighbour to the owner of the land over which the boughs were overhanging did not create a "right" within the definition of "easement" in the Indian Easements Act, nor did the convenience to the owner of the tree always changing in extent and position of space, become at any time so determinate that it could by any length of time be held to be enjoyed as "of right," a matter essential under S. 15 of that Act. In the judgment of Mr. Justice Jardine the whole law on the subject was carefully considered. The question whether such an easement was recognised by the rules of Hindu Jurisprudence was discussed, and the principles applied in such cases by the Courts in England explained. There is no reason why we should differ from the conclusion arrived at in that judgment, and there can be no such easement as is claimed in this case which can be acquired by prescription.

It is contended, however, that although such an easement cannot be acquired by prescription it can be acquired by local custom. The same question arose in *Vishnu v. Vasudeo* (2), where the plaintiff claimed the same relief as the plaintiff in this suit. Before the appeal Court it was argued that the defendants should have been allowed to prove the alleged custom as to his right to retain the trees overhanging the plaintiff's land. Shah, J. said (P. 828):—

"As to the first point I have no hesitation in disallowing the appellant's contention. It is clear on the authorities, and for the purpose of this point it is not disputed before us, that the plaintiff has the right to cut off those portions of the trees which overhang his land. This right is recognised in *Lemmon v. Webb* (3); *Hari Krishna Joshi v. Shankar Vithal* (1) and

(1) [1895] 19 Bom. 420.

(2) [1918] 43 Bom. 164=47 I. C. 629=20 Bom. L. R. 826.

(3) [1895] A. C. 1=64 L. J. Ch. 205=11 R. 116=71 L. T. 647=59 J. P. 564.

Lakshmi Narain Banerjee v. Tara Prosanna Banerjee (4). As regards the alleged custom, the defendant described the custom in the written statement in these terms: 'No owner of plantation can make a complaint against another owner even if these trees grow in any direction in the air. There is a Vahivat (custom) to this effect in our province continuing over thousands of years.'

When the issues were framed, there was no specific issue raised as to this custom. After the hearing of the suit commenced, an application was made on November 29, 1915, in which the defendant requested the Court to raise the issue as to custom in these terms: 'Does defendant prove that there is a custom in the village not to complain against overhanging of cocoanut trees over every neighbour's land?' The trial Court disallowed the application of the defendant for this issue and the evidence relating to it. It is urged before us that the trial Court should have allowed the defendant an opportunity of proving this custom. Having regard to the terms of the issue it seems to me that the trial Court was right in disallowing the defendant's application. As stated in the written statement, and as indicated in the proposed issue, there is a custom in the village not to complain against the overhanging of cocoanut trees over neighbour's lands. It seems to me that such a custom would not be reasonable and cannot be pleaded. In effect it amounts to a plea that a person whose right to land is infringed cannot sue in respect of that infringement. Apart from the form in which the alleged custom is stated by the defendant it seems to me that in substance it is indefinite and vague; and, in my opinion, it will serve no useful purpose to direct at this stage an inquiry as to custom, which, as stated by the defendant, does not appear to be either reasonable or definite. In this view of the case it is not necessary to consider Mr. Gokhle's argument on behalf of the respondent that there could be no customary easement in respect of the right to overhang the trees on a neighbour's land as such a right is not an easement within the meaning of the definition of 'easement' under the Indian Easements Act. I express no opinion on the general question as to whether the right to retain the trees overhanging the neigh-

bour's land is a customary easement within the meaning of S. 18 of the Indian Easements Act."

Although *Hari Krishna Joshi v. Shankar Vithal* (1) was referred to on the question whether the plaintiff had a right to cut off those portions of the trees which overhung his land, the learned Judges avoided deciding whether there can be such a customary easement within the meaning of S. 18 of the Indian Easements Act as was claimed by the defendants in the case before them. But it seems to us that the decision in *Hari Krishna Joshi v. Shankar Vithal* (1) is sufficient authority for deciding that there can be no such easement, as is claimed in this case within the meaning of that term in the Indian Easements Act, and if there can be no such easement, then such a right cannot be proved to exist by local custom under S. 18 of the Indian Easements Act. We think the lower appellate Judge was right in saying that the custom set up was too vague and indefinite. It was neither ancient nor invariable. Besides, if a few persons chose to tolerate their neighbour's palms overhanging their houses, such act could not establish a custom binding on all others.

The result must be that the appeal is dismissed and the decree passed by lower appellate Court confirmed.

The appellant objected to the terms of the decree, but it is difficult to see how the plaintiff's right could be protected by any other order. The plaintiff is entitled to cut off such portion of his neighbour's trees as overhang his land, and the decree allows the defendant to cut off those portions of the two palms and one jack-fruit-tree which overhang the plaintiff's land before the plaintiff exercises his own rights in the matter.

Respondent No. 1 will get his costs of the appeal.

Appeal dismissed.

(4) [1904] 31 Cal. 944=8 C. W. N. 710.

1925 BOMBAY 449

MACLEOD, C. J., AND COYAJEE, J.

Burjor F. R. Joshi—Appellant.

v.

Ellerman City Lines, Ltd.—Respondents.

O. C. J. Appeal No. 30 of 1925 and suit No. 3550 of 1923, Decided on 16th July 1925.

Arbitration Act, S. 4—Bill-of-lading giving option to one party only to choose forum—There is no submission within S. 4.

By a clause in a bill-of-lading it was provided that all claims arising under the said bill-of-lading shall be determined at the port of destination of the goods according to British Law, or, at the ship-owner's option, shall be determined in the United Kingdom and to the exclusion of the jurisdiction of any other country;

Held: that unless the ship-owners exercised their option the parties would be able to file proceedings in the Courts of the port of destination. The definition of submission in S. 4 of the Arbitration Act cannot be extended so as to include an agreement such as the one appearing in the bill. A submission to arbitration, according to S. 4, is a submission which provides that either party in case of a dispute arising on the contract is at liberty to take the necessary steps to get the dispute decided by arbitration. 1924 Bom. 381 Dist.

[P. 450 C. 2 ; P. 451 C. 1]

C. L. Setalvad—for Appellant.

Coltman—for Respondents.

Macleod, C. J.—The plaintiff filed this suit on 20th August 1923, claiming as an endorsee of a bill-of-lading for 280 tons of potatoes shipped on board the defendants' ship, *The City of Calcutta*, at Naples. It was alleged that when the goods arrived in Bombay, on or about 28th August 1922, a great portion of them were found to be totally damaged and unfit for any use. Notice of the damage was given to the defendants' agents in Bombay, and it was claimed that the damage was due to the fact that the ship was not fit to carry such cargo, and that the defendants failed to take proper and reasonable care of the said goods. The delay in filing the suit originally appears to have been due to the fact that parties were endeavouring to settle their differences without having recourse to a Court of law.

On 3rd October 1923, the defendants entered an appearance in the following form, which was directed to the Prothonotary:

"Please enter an appearance which is made under protest on behalf of the defendants in the above suit, who intend

to defend it upon *inter alia* the ground of no jurisdiction."

Thereafter there was a further attempt to settle the dispute.

On 6th December 1924, the defendants' solicitors wrote to the plaintiff's solicitors:

"The above suit appears on the prospective board. Pursuant to your instructions in your letter No. 30543, dated 15th December 1923, we have done nothing in the matter. Is the suit now to be dismissed? Please let us hear from you."

On 6th January 1925, the plaintiff's solicitors replied:

"We have seen our client and are instructed to state that our client will proceed with the suit as your client has refused arbitration. If, as you say, you have done nothing in the matter so far, our client is willing to consent to the suit being postponed for some months."

On 23rd January 1925, the defendants took out a summons asking for an order that the suit and all proceedings thereunder be stayed.

An affidavit was filed in support of the summons, clause 4 of which is as follows:

"By clause 20 of the said bill-of-lading it is provided that all claims arising under the said bill-of-lading shall be determined at the port of destination of the goods according to British law, or, at the shipowners' option, shall be determined in the United Kingdom and to the exclusion of the jurisdiction of any other country."

Exhibit A to the affidavit was the bill-of-lading, clause 20 of which is correctly set out in para. 4 of the affidavit.

The plaintiff filed an affidavit in reply setting out the negotiations which had passed between the parties after the claim had been made. At the end of para. 3 there is the following passage:

"I say that I had consented to further proceedings in the suit being stayed solely because negotiations for settlement were pending. From August 1923 till January 1925 the defendants never stated, either through their agents or their attorneys, that they wanted to have the dispute decided by a Court of justice in the United Kingdom. Under these circumstances I submit the defendants are estopped from taking advantage of clause 20 in the bill-of-lading at this stage of the suit and are not entitled to have the suit and the proceedings therein stayed."

That statement does not appear to have been in any way contradicted by the affidavit filed on behalf of the defendants on 4th February 1925.

We may take it then that until the affidavit was filed in support of the summons on 22nd January 1925, the defendants had not attempted to exercise the option, which they asserted they had, of compelling the plaintiff to file his suit in the Courts of the United Kingdom.

The summons came on for hearing before Mr. Justice Taraporewalla on February 13, 1925. The learned Judge said that it was conceded that if the parties agreed to have their disputes decided by a foreign tribunal, it would amount to a submission to such foreign tribunal, and that there were decisions of this Court which were binding on him in which it had been so held. The learned Judge was probably referring to the last case on this point decided by this Court in *Haji Abdulla v. Stamp* (1). In that case there was a dispute with regard to a claim on a policy of marine insurance, which provided that all disputes should be referred to England for settlement and no legal proceedings should be taken to enforce any claim except in England where the under-writers were alone domiciled and carried on business. It was held by this Court, following the decision in *Austrian Lloyd Steamship Company v. Gresham Life Assurance Society* (2), that the above clause in the policy of insurance amounted to a submission to arbitration, and an order, therefore, was made that the suit should be stayed pending the result of such arbitration. The same point arose in *Kirchner & Co., v. Gruban* (3):

"By an agreement in writing dated June 30, 1905 the defendant, a German subject agreed with the plaintiffs, a Leipzig firm, to act as their representative in the United Kingdom; to devote all his activity and industry exclusively to the sale of their goods; not to divulge any business matter to anyone; and under a money penalty to remain in his position and not to give notice before July 1, 1910, to be three months' notice if then given. The parties agreed to submit themselves in all cases of dispute to the exclusive jurisdiction of the Leipzig

Courts and to the exclusive applicability of the German Law. Held, (1) that *prima facie* the agreement to refer was binding upon the parties and was one upon which the Court would act unless for some good cause the matter ought to be determined otherwise than by the Leipzig Court."

We think then that if the clause in the bill-of-lading could be read as stating that all claims arising thereunder should be determined according to British Law, or should be determined in the United Kingdom, and to the exclusion of the jurisdiction of any other country, it might have been said that there was an agreement to refer any dispute for the decision of the Courts of the United Kingdom. But that is not what the clause says. Unless the shipowners exercised their option the parties would be able to file proceedings in the Courts of the port of destination.

The real question is whether as a matter of fact this particular clause was a submission to arbitration within the meaning of the word in clause 4 of the Indian Arbitration Act. On this question the Judge said:

"The other question for which I took time to consider was a question raised by the plaintiff that as clause 20 gives option to one party only to have the matter determined by a foreign tribunal it does not amount to a submission under the Indian Arbitration Act and that for the purpose of making it a valid agreement to submit, both the parties should be equally bound. I have not been able to find any authority on the point, but on a careful consideration of the matter, I cannot agree with the plaintiff's contention. The parties here agreed to have the matters decided by a foreign tribunal, but at the option of one of the parties. Immediately that party exercises that option, in my opinion, the parties are bound to have the matters determined by arbitration, and it is no less a submission coming within the definition in the Indian Arbitration Act because the right is to be exercised at the option of one of the parties. The other party has agreed to abide by that option so that immediately the shipowners exercised that option, there is an agreement to refer the matters to a foreign tribunal, and originally the Court would stay the proceedings and leave the parties to their remedy by arbitration

(1) 1924 Bom. 351=26 Bom. L. R. 224.

(2) [1933] 1 K. B. 249.

(3) [1909] 1 Ch. 413.

It seems to me that a submission to arbitration, according to S. 4 of the Indian Arbitration Act is a submission which provides that either party, in case of a dispute arising on the contract, is at liberty to take the necessary steps to get the dispute decided by arbitration. Under this agreement the plaintiff had no option. It is true that he could file a suit in the Courts of the United Kingdom subject to any question of jurisdiction. Certainly he could file a suit in Bombay; but he could not insist, if the defendant wished to file a suit, that the suit should be decided in the Courts of the United Kingdom. Therefore, at the time the suit was filed, there was no submission to arbitration existing so far as the plaintiff was concerned, of which he could take advantage, and it would only be when the defendants took the objection that they had an option to have the suit tried in the Courts of the United Kingdom, that it could be said that the jurisdiction of this Court was in any way interfered with.

I do not think, therefore, that the definition of "submission" can be extended so as to include an agreement such as the one appearing in clause 20 of the bill-of-lading. Leaving aside the particular nature of this agreement, if there had been an ordinary agreement to refer any disputes that might arise to the arbitration of named arbitrators at the option of one of the parties, then I should certainly hesitate before holding that was a submission within the proper meaning of that term.

But even on the merits, assuming there was a submission, so that the Court would be entitled under S. 19 of the Indian Arbitration Act to stay proceedings, we do not think that this is a case in which proceedings should be stayed. We do not think that in the circumstances of the case the plaintiff should be compelled to start proceedings afresh in order to get the dispute between him and the defendant company decided, and there is no reason whatever why this claim arising in August 1922, the subject-matter of a suit of 1923, should not be decided in these Courts as early as possible. Either party can apply under the rules to have the suit transferred to the list of commercial causes, when the hearing can be expedited. The summons will be discharged with costs in this Court and in the lower Court.

Coyajee, J.—I am of the same opinion.
Summons discharged.

★★ 1925 BOMBAY 451

Full Bench.

MACLEOD, C. J., SHAH AND
COYAJEE, JJ.

Sakharam Narayan Patwardhan and others—Plaintiffs—Appellants.

v.

Balkrishna Sadashiv Modak—Defendant—Respondent.

Second Appeal No. 109 of 1904, Decided on 3rd April 1925, from the decision of the Joint Judge, Thana, in Appeal No. 52 of 1922.

★★ *Hindu Law—Succession—Bandhus—Vyavahara Mayukha—Father's sister's son is preferred to maternal uncle.*

In Bombay Presidency, under Vyavahara Mayukha, a father's sister's son is a preferential heir to the maternal uncle.

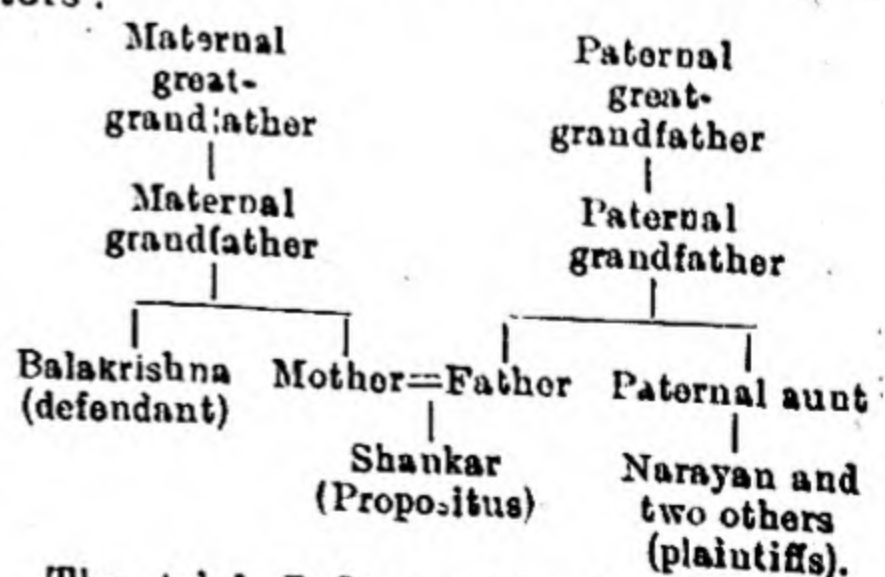
Per Shah, J.—The father's sister's son has closer affinity with the propositus on account of his connection through the paternal grandfather than the maternal uncle who is connected with the deceased through his maternal grandfather and also judged by the test of religious benefit to the propositus resulting from oblations offered by the two bandhus in question, the father's sister's son should be preferred to the maternal uncle. [P. 457, C. 1 and 2.]

G. S. Rao—for Appellants.

P. B. Shingne—for Respondent.

Macleod, C. J.—The plaintiffs in this suit sued for the possession and income of certain property, claiming to be the heirs as the paternal aunt's sons of one Shankar Balkrishna who died in 1918 unmarried; the defendant resisted the claim on the ground that, as the maternal uncle of the deceased, he was the nearest heir.

The following pedigree shows the relationship of the parties and their ancestors:



The trial Judge, without giving any reasons, said that the plaintiffs were the preferential heirs of the deceased and passed a decree in their favour.

The defendant appealed.

The Joint Judge said: "The appellant as well as the respondents are sapinda; to the deceased Shankar. Unquestionably the maternal uncle stands nearer to Shankar by sapinda relationship than the respondents. This is one of the grounds on which the maternal uncle should be preferred to the respondents. The other ground, *viz.*, the doctrine of spiritual benefit proceeds upon the right to perform the parvana shraddha." He then considered, as the maternal uncle offered the pinda to the maternal grandfather and great-grandfather of Shankar, while the plaintiff offered the pinda to the paternal grandfather and great-grandfather of Shankar, and as Shankar was bound to offer the pinda to both his paternal and maternal ancestors that it would be difficult to determine the question who would confer the greater spiritual benefit on the deceased Shankar. He decided in favour of the maternal uncle as Shankar would be under the obligation to offer the pinda to his maternal uncle while there was no obligation to offer the pinda to the paternal aunt's sons.

Accordingly the appeal was allowed and the plaintiffs' suit dismissed with costs throughout.

The plaintiffs have appealed to this Court.

The plaintiffs and defendant are atma-bandhus of the deceased. The question to which of two contesting atma-bandhus preference should be given is always arising, and though there is no dispute as to the texts which are applicable it has been found impossible by the Courts to lay down any common rules of inheritance which would enable the dispute between any possible pair of claimants to be decided.

Mr. Mulla, in his principles of Hindu Law, gives a list of forty-two male atma-bandhus, besides female bandhus, and has endeavoured to state the rules which govern succession amongst them; but these rules, as he points out in his latest edition, are subject to alterations as the result of judicial decisions.

In *Saguna v. Sadashiv* (1) there was a contest between the father's half-sister and the maternal brother. The case

came from Ratnagiri where the Mitakshara prevails.

According to the Vyavahara Mayukha the father's sister is a gotraja sapinda; but it is not clear whether under the Mitakshara, as interpreted in the Bombay Presidency, she is a gotraja sapinda or a bandhu. Sir Lawrence Jenkins considered it unnecessary to decide this question as it was sufficient to say she was not more remote than a bandhu. He then dealt with the argument, based on the decision in *Narasimma v. Mangammal* (2), that except where females were specially mentioned priority was given to male heirs. It was conceded that as between heirs of the same line preference was given to males, but that as between different lines of heirs sex had no place as a determining factor. The fact that the mother was given preference to the father in heirship to the son was not considered as influencing succession where the contest lay between those claiming through the father and those claiming through the mother. If there had to be a choice between the analogy furnished by the order of succession as between father and mother directly on the one hand, and by the order of succession as between pitrubandhus and matrubandhus on the other, the choice would fall on the latter as being the closer, and for what it was worth the conclusion to which that led was in correspondence with the orders on which those internal lines were enumerated in the text cited by Vijñanesvara. "The sons of his own father's sisters, the sons of his own mother's sister and the sons of his own maternal uncle must be considered as his own cognate kindred." That was supported by the opinion attributed to Balambhatta, who contended that the father should have precedence over the mother "upon the analogy of more distant kindred, where the paternal line has invariably the preference before maternal kindred." It was, therefore, held that as between the deceased's own bandhus, those connected through the father were to be preferred to those connected through the mother. It will be noted that no mention was made of the question whether the spiritual benefit conferred upon the propositus by rival bandhus was to be considered as a ground of preference.

In *Vedachela Mudaliar v. Subramania*

(1) [1902] 26 Bom. 710=4 Bom. L. R. 527.

(2) [1889] 13 Mad. 10.

Mudaliar (3) the contest was between the maternal uncle and the paternal aunt's grandson. The appeal came from the Madras High Court and their Lordships reviewed in an exhaustive manner the whole question of the order of succession amongst bandhus. The head-note to the report does not seem to be absolutely correct as it can only be inferred from their Lordships' judgment that they disapproved of the decisions in *Sundrammal v. Rangasami Mudaliar* (4) and *Balusami Pandithar v. Narayana Rau* (5), so far as they held that among bandhus of the same class those *ex parte paterna* are to be preferred to those *ex parte materna*. Their Lordships said: "Recent writers on Hindu law have divided each class of bandhus into two sub-classes respectively designated as cognates *ex parte paterna*, and cognates *ex parte materna*. This sub-division is evidently based on an inference from the order in which the several bandhus are mentioned in the illustrative enumeration, for instance, among the *atmabandhus* enumerated the name of the father's sister's son is first given; then comes the mother's sister's son; and after him, the son of the mother's brother.... From this it has been inferred that the expounder of the rule in question intended that each class should be divided into two sub-classes according to the side of relationship, and that in every case preference should be given to the father's side. Their Lordships, again, in the view they take of the rights of the parties in the present case, do not think it necessary to express an opinion how far this proposition is in conformity with the express rule that in each class propinquity should be the governing factor." Their Lordships then considered various Madras decisions: *Narasima v. Mangammal* (2), where the maternal uncle was preferred to the father's sister; *Chinnammal v. Venkatachala* (6) where the maternal grandfather was preferred to the father's sister; *Muthuswami v. Muthukumarasami* (7) where the mother's half brother was preferred to the father's paternal aunt;

(3) 1922 P. C. 33=44 Mad. 753=49 I. A. 349=14 L. W. 402=2 P. L. T. 707=41 M. L. J. 676=[1921] M. W. N. 669=26 O. W. N. 159=24 Bom. L. R. 649=80 M. L. T. 198 (P. C.).

(4) [1894] 18 Mad. 193=4 M. L. J. 275.

(5) [1897] 20 Mad. 342=7 M. L. J. 207.

(6) [1891] 15 Mal. 421=2 M. L. J. 86.

(7) [1892] 16 Mad. 23=2 M. L. J. 296.

Sundrammal v. Rangasami Mudaliar (4) where the paternal uncle's daughter's son was preferred to the sister's daughter and the mother's sister's sons and *Balusami Pandithar v. Narayana Rau* (5), where the sister's son's son was preferred to the maternal uncle's son. Among other reasons for the conclusion in that case it was stated at the end of the judgment (P. 349): "Another fundamental principle of the law in favour of the third defendant's preferable right is that among bandhus of a class those who are *ex parte paterna* take before bandhus *ex parte materna*." The learned Judges relied on this division of *atmabandhus* into those two sub-classes in para 598 of the *Sarasvati Vilasa* (Setlur's Collection of Hindu Law Books on Inheritance, p. 184): "Nor could it be urged here that the mother being nearer than the father, the *matru-bandhus* take the wealth before the *pitru-bandhus*. From the text, of these the mother is more important than the father; (2) the mother's precedence alone is stated and not that of the mother's bandhus. Therefore, we think it sound that the *matru-bandhus* should take the wealth only after the *pitru-bandhus*." Their Lordships of the Privy Council remarked that a very small consideration would show that the passage had nothing to do with the members of the same class *inter se*. It only explained why *pitru-bandhus* were to be preferred to *matru-bandhus*, the mother's position being special to herself under an express rule.

In the end their lordships, after considering the texts, the commentaries, the judicial decisions and the view of modern writers, fell back on the four propositions in *Muthusami v. Muttukumarasami* (7) which as a matter of fact give one very little assistance in deciding in a particular case which of two rival *atmabandhus* is to be preferred. The third proposition is as follows: "The examples given in the text of *Vridha Satapa* or *Boudhayana* are intended to show the mode in which nearness of affinity is to be ascertained." That proposition was useful in the case before the Court as showing that the maternal uncle's son was an *atmabandhu*, while the father's paternal aunt's son was a *pitru-bandhu*; but it does not help to decide whether the maternal uncle is to be preferred to the father's sister's son. The fourth proposition was as follows: "That as between bandhus of the same class, the

spiritual benefit they confer upon the propositus, is, as stated in the *Viramitrodaya*, a ground of preference." But how is spiritual benefit to be measured, and how far as a ground of preference will it prevail against propinquity? There would certainly appear to be some foundation for the opinion expressed by Sadasiva Ayyar, J., though their Lordships were not prepared to accept it, that the introduction of such questions as spiritual benefit or of death pollution, or of the right of performance of obsequial ceremonies would only lead to inextricable confusion. In many cases who is the nearest heir can easily be decided without any consideration of such questions; but when the rival merits of the claimants are fairly equally balanced we have no guide as to the extent to which the answer to these questions can avail as a ground of preference. Their Lordships approved the express rule that in succession amongst bandhus, to the nearest sapinda the inheritance belonged, and so far that would appear to conflict with the rule laid down in *Saguna v. Sadashiv* (1), but the test of nearness of affinity to the deceased had also to be regulated by the test of spiritual benefit. To what extent spiritual benefit is to be considered a ground of preference so as to overcome nearness of affinity still remains to be decided in each contest amongst bandhus. In the contest between the maternal uncle and the paternal aunt's grandson there was no difficulty; the former was the nearer heir and offered oblations to the maternal grandfather and great-grandfather of the propositus, while the latter offered no oblations to the ancestors of the propositus.

In *Balkrishna v. Ramkrishna* (8) it was held by this Court, following *Narasimma v. Mangammal* (2) and *Rajah Venkata Narasimha v. Rajah Surendra Venkata Purushothama* (9) that male bandhus should be preferred to females so that a mother's sister's son was preferred to a brother's daughter, but, as pointed out in *Kenchava v. Girimallappa* (10), *Sagunna v. Sadashiv* (1) was not cited, so that

(8) [1920] 45 Bom. 553=59 I. C. 771=22 Bom. L. R. 1412.

(9) [1908] 31 Mad. 321=18 M. L. J. 409=1 M. L. T. 5.

(10) 1924 P. C. 209=48 Bom. 559=51 I. A. 368=26 Bom. L. R. 779=20 M. L. W. 417=47 M. L. J. 401=22 A. L. J. 932=5 L. R. P. C. 182=40 C. L. J. 447=29 C. W. N. 271=(1924) M. W. N. 719=35 M. L. T. 241=3 Pat. L. R. 9 (P. C.).

whenever the two conflicting principles of preference of the paternal over the maternal line, and preference of the male over the female sex in the Presidency of Bombay had to be weighed, the Court which weighed them would have to choose between the two decisions.

Now, if the bandhus on the father's side had to be preferred to those on the mother's side the paternal aunt's grandson would have been preferred to the maternal uncle in *Vedachela v. Subramanya* (3), and the decision of the Privy Council in that case must no doubt be treated as preventing the rule in *Saguna v. Sadashiv* (1) being considered as a rule of universal application.

In the present case, if we follow *Saguna v. Sadashiv* (1) undoubtedly the plaintiffs succeed. If we consider propinquity, together with the doctrine of spiritual benefit, the defendant is nearer to the propositus while the oblations offered by the plaintiffs to the paternal ancestors are more efficacious, since we cannot agree with the Joint Judge that the oblations offered to maternal ancestors are of equal value. Nor can we agree with the final test suggested by him with regard to the pindas to be offered by the propositus to the rival claimants. We are then confronted with the impossible task of expressing an uncertain measure of superiority of spiritual benefit in terms of propinquity or *vice versa*. Propinquity can be expressed in degrees of relationship to the propositus. Spiritual benefit can only be said to be greater, equal or less. Can the greater efficiency of the oblations offered by the plaintiffs to the paternal ancestors of the propositus overcome the fact that the defendant is one degree nearer the propositus than the plaintiff, and can the paternal relationship of the plaintiffs be counted in their favour? Perhaps it will be sufficient to say that in my opinion, weighing all these considerations, preference should be given to the plaintiffs.

The appeal is allowed and the decree of the trial Court restored. The plaintiffs will get their costs in this Court and in the lower appellate Court.

Shah, J.—The question of Hindu Law that arises in this second appeal is as to who is the preferential heir between the father's sister's son and the maternal uncle of the deceased. The plaintiffs are the sons of the sister of the father of the deceased and the defendant is the mater-

nal uncle of the deceased. The trial Court found in favour of the plaintiffs without giving any reasons and apparently without any doubt or difficulty about the point.

The learned Joint Judge who heard the appeal held in favour of the maternal uncle, and dismissed the plaintiffs' suit. The reasoning of the learned Judge briefly is that applying the test of religious efficacy the maternal uncle is nearer than the father's sister's son.

It is urged on behalf of the plaintiffs-appellants before us that in the text relating to bandhus the father's sister's son is mentioned while the maternal uncle is not mentioned and that therefore he should be preferred. Further, it is urged that both being atmabandhus the bandhu *ex parte paterna* should be preferred to the bandhu *ex parte materna* among bandhus of the same class, that on the ground of propinquity the father's sister's son is nearer than the maternal uncle, and that the mere calculation of degrees in the case of one on the father's side and in the case of the other on the mother's side cannot help the Court in deciding the question of propinquity as the consideration of degrees from two different sides involves an element of difference which renders the mere number of degrees an unsafe guide. It is also urged that even if the test of religious efficacy be applied, the father's sister's son, who can offer oblations to his three maternal ancestors, who would include the paternal grandfather and great-grandfather of the deceased, should be preferred to the maternal uncle, who can offer oblations to his father, paternal grandfather and great-grandfather, who would be the three maternal ancestors of the deceased.

On the other hand, on behalf of the defendant-respondent, it is urged that propinquity is the only test for determining the question of preference among bandhus of the same class, that the maternal uncle being nearer from the mother's side than the father's sister's sons from the father's side the former should be preferred to the latter on the ground of nearer affinity. It is urged that in *Vedachela Mudaliar v. Subramania Mudaliar* (3) the test really adopted is one of propinquity and that the test of spiritual benefit to the propositus cannot be considered as affording any safe guide in a case where one bandhu

can offer oblations to three maternal ancestors of the deceased and the other can offer oblations to two paternal ancestors to whom the deceased could have offered oblations. Mr. Shingne did not argue—at least I did not understand him to argue—that the spiritual benefit conferred by the maternal uncle is greater than that conferred by the father's sister's son. Several decisions have been referred to in the course of the argument; but there is none directly bearing on the competition between the two particular bandhus, whose claims we have to consider.

On a careful consideration of the arguments I am of opinion that the father's sister's son should be preferred to the maternal uncle as a nearer bandhu. I shall briefly state my reasons for this conclusion.

At the outset it may be mentioned that both are atmabandhus; both are males and one is expressly mentioned in the well-known text relating to bandhus referred to in the Mitakshara and the Vyavahara Mayukha. It is expressly pointed out in the Mitakshara and the Vyavahara Mayukha that the atmabandhus exclude the pitrubandhus and that the pitrubandhus are to be preferred to matrubandhus on account of their near affinity. It has also been held that the particular bandhus expressly mentioned in each class in the text are illustrative of the class and that the enumeration is not exhaustive. It has also been held that those expressly mentioned are not necessary to be preferred to those not mentioned simply because they are mentioned. This position was accepted by this Court in *Mohandas v. Krishnabai* (11), where the maternal uncle, not expressly mentioned, was preferred to mother's sister's son expressly mentioned, and in *Rajeppa v. Gangappa* (12), where the question of the relative rights of two male atmabandhus related on the mother's side and expressly mentioned was considered independently of this consideration. In spite of the argument of Diwan Bahadur Rao, based upon the foot-note No. 3 in Mandlik's Hindu Law at p. 82 of the translation, which in its terms is based upon the rule quoted in the foot-note (No. 7) in the Sanskrit text of the Vyavahara Mayukha at p. 54 of the same book, the

(11) [1881] 5 Bom. 597.

(12) 1922 Bom. 420 = 47 Bom. 48 = 24 Bom. L. R. 789.

preference of the father's sister's son to the maternal uncle cannot be based on that ground.

I also desire to point out that in this case there is no question of a nearer female bandhu being preferred or postponed to a more distant male bandhu; and there is no question here of weighing any conflicting principles of preference of the paternal over the maternal line and the preference of the male over the female sex in this Presidency. That conflict will have to be settled when it arises for consideration, as pointed out by their Lordships of the Privy Council in *Kenchava v. Girimallappa Channappa* (10).

The test of preference is propinquity. The word used in the Mitakshara is *antarangatva* (अंतरंगत्व) In the case of bandhus we have to consider the blood relationship. The method of determining the nearness by calculating the number of degrees from the common ancestor cannot apply to bandhus so effectively as to sapinda sagotras. The maternal uncle, taking the common ancestor on the mother's side, may appear one degree nearer than father's sister's son as taken from the common paternal ancestor. But where there is not one common ancestor either paternal or maternal for the purpose of determining the relative position of the two bandhus, this way of determining the nearness cannot be decisive and the element of differences between the paternal and maternal line necessarily comes in.

In this Presidency the preference of the paternal over the maternal line among the same class of bandhus was approved in *Saguna v. Sadashiv* (1). That preference has not been totally negatived in any case. It is perfectly true that the universal preference given to the paternal over the maternal line has been definitely negatived by their lordships in *Vedachela Mudaliar's* case (3); but in that case their Lordships do not go so far as to say that there is no scope for any preference whatever on that ground. Its application as a conclusive test with reference to the consideration of near affinity, has been negatived, but its consideration as an element in determining the propinquity or affinity is not excluded. In fact it could not be excluded; for in that very case their Lordships expressly approve of the test of religious benefit laid down by Muthusami Ayyar, J. in *Muthusami v.*

Muthukumarasami (7); and in applying the test of spiritual benefit the possible superiority of the pindas offered to the paternal ancestors of the deceased over pindas offered to the maternal ancestors does come in for consideration in an apparently different form. But in substance it is the same thing as the preference of the paternal over the maternal line.

In applying the test of affinity unencumbered by any considerations of spiritual benefit, it must be remembered that the daughter and the daughter's son occupy a very high place in the list of specified heirs. Then the sister (*i. e.*, the father's daughter) is mentioned as an heir in the Vyavahara Mayukha after the specified heirs before the agnates and in this Presidency under the Mitakshara also the sister, though not expressly mentioned, has got an equally high place. The cases with reference to the position of the sister in this Presidency are referred to at p. 554 of the report in *Dattatraya Bhimrao v. Gangabai* (13). In the Madras Presidency the sister would occupy a much lower place even among bandhus.

Then, when we come to the sister's son, though he is not mentioned as a bandhu, he would occupy a high place among the atmabandhus in this Presidency; and certainly he would not be preferred to the sister as in Madras. It is sufficient to refer to the decision in *Ichharam Shumbhoois v. Pramanund Bhreechund* (14).

Then we come to the father's sister, that is the grandfather's daughter. According to the decision in *Saguna v. Sadashiv* (1) she would be preferred to the maternal uncle. I am willing to treat it as an open question whether on account of her being a female she will be able to retain the place which has been assigned to her by Jenkins, C. J. with reference to the maternal uncle in view of the later decisions in *Balkrishna v. Ramkrishna* (8) and *Kenchava v. Girimallappa Channappa* (10). I do not desire to lay any emphasis on the decision in *Saguna's* case, beyond indicating that after consideration the paternal line was given preference over the maternal line, and that if that preference is not to be altogether excluded, her son, who is mentioned as an atma-

(13) 1922 Bom. 321=46 Bom. 541=24 Bom. L. R. 69.

(14) [1923] 2 Borr. 515.

bandhu, would be considered a nearer relation on account of his connection with the paternal line of the propositus. As regards the maternal uncle, while he is a very close blood relation on the mother's side, the idea of preference of the paternal over the maternal affinity cannot be altogether excluded. Without, therefore, attempting to generalise beyond the necessity of the case, in my opinion the father's sister's son has closer affinity with the propositus on account of his connection through the paternal grandfather than the maternal uncle who is connected with the deceased through his maternal grandfather.

I have dealt with the question so far without reference to the test of spiritual benefit to the propositus. That test is difficult of application generally speaking as regards bandhus when one is connected through the paternal line and the other through the maternal line. It brings into operation the difference between the oblations which it is the duty of a person to offer at different kinds of Shraddhas. I shall refer briefly to Dharmasindhu and Nirayasinidhu as to the obligations to offer oblations to the maternal ancestors. Parvana Shraddhas are of three types which are described as Ekaparvanaka, Dwiparvanaka and Triparvanaka in the Dharmasindhu. (The Niraya Sagar Press—2nd edition, p. 285. In the latter two kinds of Parvana Shraddhas the deceased in his life-time would offer oblations to his three paternal ancestors as well as three maternal ancestors, while in the first type of Parvana Shraddha he would offer oblations to his three paternal ancestors. In the case of the father's sister's son he would offer oblations to his three maternal ancestors who would include the paternal grandfather and the great-grandfather of the deceased when he performs Shraddhas of the Dwiparvana and Triparvana types. In the case of the maternal uncle he would be offering pindas to the paternal ancestors in all the three kinds of Parvana Shraddhas, to whom the propositus would be offering oblations under the Dwiparvanaka and Triparvanaka Shraddhas. And there is a fourth class of Parvana Shraddha in which Mahalaya and Tirtha Shraddhas for maternal ancestors can be performed as a Parvana. It is not without some reluctance that I have referred to these distinctions referred to

in Dharmasindhu in the passage, an extract wherefrom I have attached as note No. 1 to this judgment for ready reference. In the Nirayasinidhu, the obligation to offer oblation to the maternal ancestors is referred to at p. 279. Niraya Sagar Press, second edition. I have put up this extract as note No. 2. These references incidentally illustrate the difficulty of applying the test of spiritual benefit.

But in the present case, to put it in a simple form in which it has been referred to in the decided cases, it would be accurate to say that the father's sister's son could offer oblations among others to his three maternal ancestors who would include the paternal grandfather and great-grandfather of the deceased, while the maternal uncle would offer oblations to his three paternal ancestors who would be the three maternal ancestors of the deceased. The religious benefit to the propositus would be greater on account of his participation in the offerings to his two paternal ancestors than from his participation in the offerings to his three maternal ancestors. There is no decision so far as I am aware which says that no preference is to be given to offerings to paternal ancestors over those to maternal ancestors; and without passing to weigh with nicety the relative efficacy of the oblations, which may be or should be offered in different types of Shraddhas and to ancestors in different lines, I feel no difficulty in saying that judged by the test of religious benefit to the propositus resulting from oblations offered by the two bandhus in question the father's sister's son should be preferred to the maternal uncle.

I desire to make it clear that though I have considered the question of spiritual benefit to the propositus with reference to the two particular bandhus whose relative rights we have to decide, I rely largely upon the test of propinquity which is to be applied with due regard to the preference of the paternal over the maternal line within certain limits as indicated by the broad fact that all pitrubandhus are to be preferred to matrubandhus and that in this Presidency the sister is assigned a high place among the heirs.

I need hardly add that I accept *Vedachala Mudaliar's case* (3) as a conclusive authority for the proposition that the maternal uncle is to be preferred to the father's sister's son's son. But there i

nothing in the judgment to show that the father's sister's son cannot be preferred to the maternal uncle.

I, therefore, concur in the order proposed by my Lord the Chief Justice.

Coyajee, J.—I concur in the order proposed by my Lord the Chief Justice.

Appeal allowed.

Note No. 1.

धर्मसंघः

विद्वद्र्यकाशनिधौपाध्यायविरचितः

Second Edition. "Nirnaya-Sagar" Press P. 285.

अथश्राद्धभेदाः तत्रश्राद्धचतुर्विधम् पार्वणश्राद्धमकोटिश्राद्धनान्दीश्राद्धं सपिण्डिकश्राद्धं चेत्येते भेदाः पितृदित्रयोदेशनविहितं पण्डितत्रययुतं पार्वणम् तच्चैकपार्वणकद्विपार्वणकत्रिपार्वणकामातित्रिविधम् तत्रापित्रदेवतं तथैकप्रमाणं प्रति सांवत्सरिकमेकपार्वणकम् अमावस्यादिषण्णशतश्राद्धानित्यश्राद्धानि महालयान्वष्टक्याभिन्नानि द्विपार्वणकानि एतत्सप्तनीकपित्रादित्रयमात्रादित्रयसप्तनीकमातामहादित्रययोरेवेदेशात् अन्वष्टकाश्राद्धत्रिपार्वणकं पितृदित्रयसप्तनीकमातामहादित्रयणामुद्देशात् महालयश्राद्धतिथिश्राद्धचपार्वणैकोटिरूपम् पितृदिपार्वणत्रयस्य सप्तपञ्चाशद्विष्टगणस्य चोद्देशात् कर्त्तव्यं तद्वयं मातामहमातामहयोः पार्वणभेदेन पार्वणचतुष्टययुतं कर्त्तव्यं केशाचिन्सूत्रदशैभिर्त्रिपार्वणकश्चतुः पार्वणकोवेति हेमाद्रौ ।

Note No. (2).

निर्णयसिंधुः

श्रीकमलाकरभट्टप्रणीतः

(द्वितीयावृत्तिः) निर्णयसागर प्रेस पृष्ठ २७२.

हेमाद्रौ ब्राह्मे—'पार्वणं कुरुते यस्तु केवलं पितृहेतुकम् । मातामहं न कुरुत पितृहा सप्रजायते' ॥ धौम्यः—'पितरो यत्र पूज्यन्ते तत्र माता महा धृवम् । अविशेषेण कर्त्तव्यं विशेषाच्चरकं व्रजेत् ॥' अस्यापवादमाह कात्यायनः—'कर्त्तव्यं समाहितं मुक्त्वा तथैवं श्राद्धपण्डितम् । प्रत्याब्धिकं तु शेषेषु पण्डितः स्युः षडिति स्थितिः ॥' कर्त्तव्यं समाहितं सपिण्डिककरणम् ।

★ 1925 BOMBAY 458

TARAPOREWALA, J.

Alimahomed Sale Mahomed—Plaintiff

v.

Municipal Commissioner of Bombay—Defendant.

Petition under the Indian Arbitration Act, Decided on 15th August 1924.

★ (a) *Municipal Act—Private rights cannot be interfered with beyond limited powers conferred by statute.*

The Court ought most strongly to deprecate the use of the Municipal Act for the purpose of interfering in any way with the rights of private ownership beyond those limited powers which the Corporation had obtained by statute for the necessary protection of the public and the enforcement of proper sanitation. [P. 462, C. 2]

(b) *City of Bombay Municipal Act, S. 515—Private and public nuisances can be remedied by injunction by one or all residents affected—Court can order refusal to grant license for stables but the order does not govern all cases of license for stables.*

It is necessary for the protection of the health and comfort of the inhabitants of a big city like Bombay or Calcutta that any resident, who is affected by a nuisance in the manner mentioned in S. 3 (z) of the Municipal Act, should have a right to go to a Magistrate over the head of the Commissioner or the Corporation and ask that the Commissioner should be restrained from exercising his powers so as to affect the complainant's individual right as resident by the creation of a private nuisance. If private nuisance affects two or three houses, the inhabitants of the two or three houses might either join in a complaint before the Magistrate and ask the Magistrate to decide specifically that the particular nuisance is a private nuisance affecting the residents of houses A, B and C. With regard to a public nuisance also, any resident of Bombay can ask for an order under S. 515, and, if the Court finds a public nuisance proved the order of the Court would give relief to the public of the locality as against the nuisance, and vacating of any one or more houses would not mean an abatement of the nuisance in respect of the public. In the case of a public nuisance, no particular limits need be defined. The relief which the Court can grant, under S. 515 of the City of Bombay Municipal Act, in cases of public as well as private nuisance is, *inter alia*, abatement of the nuisance by ordering the Commissioner not to grant a license for stables, etc. But it does not follow from the Court's making an order on the Commissioner that he should not grant a license, that that order is to govern all circumstances and all cases at all times. [P. 463, C. 1 ; P. 462, C. 2]

Where the Court passes an order under S. 515 to abate a nuisance with reference to a particular house, and that house falls vacant subsequent to the passing of the order and is not to be used any more for purposes other than those connected with the stables, the order ceases to have any operation. [P. 463, C. 2]

★ (c) *Nuisance—Public nuisance—Keeping of many horses in a crowded locality may become public nuisance.*

It may be that if a person keeps a very large number of horses and the locality is very thickly populated it may cause discomfort, annoyance and injury to health, not only to the residents of two or three houses but of a much larger number of houses. In that case it would be a public nuisance. [P. 463, C. 2]

B. J. Desai—for Plaintiff.

Campbell—for Defendant.

Taraporewala, J.—This is an application under the Specific Relief Act, S. 45, for an order on the Municipal Commissioner to grant the applicant a license for stables for hack victorias erected by him at Love Lane, Mazagaon, under S. 394 (1) (c) of the City of Bombay Municipal Act III of 1888. The Municipal

Commissioner has declined to issue a license in this case on the ground that he was prevented from doing so by the order of the Appeal Court: *Bombay Municipality v. Mallandaine* (1). The Municipal Commissioner has put in an affidavit in reply to the application in which he concedes that but for the judgment of the Appeal Court he is quite willing to exercise his discretion in favour of the applicant and to issue a license to him as applied for by him. In the opinion of the Commissioner, who has a discretion in the matter, the applicant is entitled to the license, and he says that if he had not been advised by his legal advisers that the Appeal Court judgment prevented him from exercising his discretion in the matter he would have issued the license to the applicant.

The question of the jurisdiction of this Court to order the Municipal Commissioner to exercise his discretion under certain circumstances under S. 45 of the Specific Relief Act has not been disputed, but I should like to refer to the judgment of this Court on the point which makes it quite clear under what circumstance this Court has jurisdiction to interfere with the discretion of the Commissioner under S. 45 of the Specific Relief Act. As to the interference with the discretion of the Municipal Commissioner there is a decision of the Appeal Court in *Haji Ismail v. The Municipal Commissioner of Bombay* (2). That was also a case of refusal to grant a license to the applicant under S. 392 of the City of Bombay Municipal Act. The learned Judges of the Appeal Court lay down at page 260 as follows: "The power, then, to grant licenses vested in the Municipal Commissioner under S. 391 being purely discretionary the only limit to its exercise is that it should not be arbitrary, vague and fanciful but it must be legal and regular." Then, on the facts of the case the Appeal Court found that they were not satisfied that the Commissioner had exercised his discretion arbitrarily and without any regard to the sanitary interests of the City for which the power is vested in him and accordingly dismissed the application of the applicant.

There is another decision of this Court in *Gall v. Taja Noora*, (3) where the ques-

tion was of the exercise of discretion by the Commissioner of Police in refusing to grant a license for the conveyance of the applicant on the ground that the Commissioner had approved a certain pattern of victoria as a public conveyance and had refused a license to the victoria of the applicant on the ground that it did not conform to the pattern. That case also went up to the Appeal Court and both the Judge of the first instance, Mr. Justice Russell, and the Appeal Court held that the ground on which the Police Commissioner had refused to grant the license was illegal and that, therefore, the Court had jurisdiction under S. 45 of the Specific Relief Act to order him to issue the license asked for. The observations of Mr. Justice Batty at page 320 and Mr. Justice Starling at page 321 show that where the Commissioner has acted illegally in refusing to exercise his discretion this Court would interfere, and order him to exercise his discretion and issue the license.

The ground in this case on which the Municipal Commissioner has declined to grant the license to the applicant is that he is prevented by the decision of the Appeal Court referred to by me from doing so. If, therefore, the Appeal Court judgment does not bear the construction which is put upon it by the legal advisers of the Municipal Commissioner, clearly the action of the Municipal Commissioner in declining to grant the license would be illegal.

The sole question, therefore, before me is whether the judgment of the Appeal Court bears the construction which is put upon it by the legal advisers of the Municipal Commissioner and whether that judgment covers the altered circumstances of the case as now existing and therefore prevents the Municipal Commissioner from granting the license. I have very carefully considered this question, as I find from the proceedings that the matter was fought out in the Court of the Chief Presidency Magistrate and before the Appeal Court in the most acrimonious spirit and as found both by the Magistrate and by the Appeal Court the parties concerned refused to consider any compromise or any middle way out of the difficulty created by the action of the Municipal Commissioner in then proposing to grant a license to the applicant. It further appears that long before the Municipal

(1) 1924 Bo n. 241=48 Bo n. 241=25 Bom. L. R. 1321.

(2) [1903] 23 Bom. 253=5 Bom. L. R. 1001.

(3) [1903] 27 Bom. 307=5 Bom. L. R. 133.

Commissioner decided to grant a license the residents of the locality had made complaints to the Municipality and the Municipal Sanitary Committee had examined the locality and made a report and the matter had again come before the Corporation, and ultimately the Corporation having decided to support the action of the Municipal Commissioner in his proposal to grant a license to the applicant, proceedings were taken, under S. 515 of the Municipal Act, by one L. R. Mallandaine, who lived in a bungalow belonging to the applicant and which bungalow was on three sides surrounded by the stables, before the Chief Presidency Magistrate. This was the first case of its kind in Bombay. It appears to me that by reason of its being the first case neither the parties nor the Chief Presidency Magistrate were quite clear in their minds as to what was exactly the issue before the Court and what was exactly the relief as bearing on that issue asked for by the complainant. I make these observations advisedly after very carefully going through the proceedings and the judgment of the Magistrate, as I find, as pointed out by Mr. Campbell in his very fair and able argument on the point, that there are stray observations in the judgment of the Chief Presidency Magistrate and indications in the evidence led before the Chief Presidency Magistrate on behalf of the complainant that the complainant was fighting not only his own battle but the battle of the other residents in the locality, who, it appears, had also financed him. The learned Magistrate has, however, based his decision mainly on the evidence which showed that the stables would cause a nuisance to the residents of the house in which the complainant resided. That the point as to whether the nuisance complained of affected the public was before the minds of the parties and the Magistrate appears to me to be clear from the fact that from the very first Mr. Campbell, who appeared for the Municipal Commissioner in that case, raised the point that the Magistrate had no jurisdiction under S. 515 of the Municipal Act to entertain the complaint as the complaint was in respect of a private nuisance and not a public nuisance. The question as to the nature of the nuisance complained of, and whether it came within the terms

of S. 515, had to be and was considered by the Magistrate. Moreover, the scope of the order, which he ultimately made, was bound to be circumscribed by the finding as to the nature of the nuisance with regard to which the Magistrate found action on his part was necessary under S. 515 of the Municipal Act. Here it is important to bear in mind that S. 515 of the Municipal Act is designed to empower the Magistrate to give summary relief by way of prevention or otherwise not only in respect of a public nuisance but any nuisance as defined by S. 3 (z) of the Municipal Act. Section 3 (z) makes it clear that "nuisance" under the Municipal Act includes both private nuisances and public nuisances. The definition runs as follows: "Nuisance" includes any act, omission, place or thing which causes or is likely to cause injury, danger, annoyance or offence to the sense of sight, smelling or hearing, or which is or may be dangerous to life or injurious to health or property. The point taken in the very first instance by counsel for the Municipal Commissioner was that notwithstanding the wide terms of the definition of "nuisance" in the Municipal Act, the words should be read as confining the definition to public nuisance only. That is to say the argument was that unless the community or large part of the community or a street or locality was affected by the nuisance the Magistrate was not to exercise the summary jurisdiction under S. 515. The point was considered at some length by the learned Chief Presidency Magistrate and although he does not quite clearly find that the nuisance complained of was not a public nuisance, he impliedly holds that it was not. Otherwise one would have found in the very forefront of his judgment that the nuisance complained of was a public nuisance and that, therefore, there was no force in the contention that it was not covered by S. 515. He might then have further held that even if he was wrong in holding that it was a public nuisance, the nuisance complained of was covered by the definition given in S. 3 (z). But he does not do so, and to my mind advisedly. There was no case of public nuisance which was either seriously put forward or which was seriously advanced in the evidence or which was seriously considered by the Chief Presidency Magistrate. There are indications of an attempt on

the part of the complainant to bring this nuisance within the definition of a public nuisance by adducing evidence of people in the locality to the effect that since the user of these stables malaria had prevailed in their houses and that malaria was due, in not solely, to a great extent, to the fact of the user of the stables. There was nothing to prevent the Chief Presidency Magistrate from holding on the evidence before him that not merely the residents in the house but the residents of the locality were affected by the user of these stables and that, therefore, it was not merely a private nuisance but a public nuisance which he wanted to abate under the powers given to him under S. 515. If one looks at the whole of the judgment, notwithstanding stray remarks here and there which might indicate that the Chief Presidency Magistrate had some doubts as to whether remotely there might not be some danger of malaria to the residents of the locality and the public, in coming to his conclusion he definitely confines himself to the particular house and the residents in that particular house. I need not quote passages from the judgment of the Chief Presidency Magistrate to show that throughout he was considering the question as if it was a fight between the complainant, as representing the residents of the bungalow in which he was living, and the Municipal Commissioner. I may here refer particularly to the appreciation by the Chief Presidency Magistrate of the evidence of Mr. Niblett, Mr. Masani and Mr. Daruwalla, who all stated that although the stables were not a public nuisance, they might result in a certain amount of nuisance to the occupants of the bungalow on the ground of noise caused by the syces talking and shouting and of insanitary conditions which might result by the washing of the horses and the victorias in the stables; and particularly on the evidence of these three gentlemen the learned Chief Presidency Magistrate holds that the stables were proved to be a nuisance within S. 3 (2) of the Municipal Act. He then also refers to the judgment of Mr. Justice Beaman in *Bai Bhicaji v. Perojshaw Jivanji* (4), which case also was a case of a private nuisance. In the final con-

clusion the learned Magistrate does bring in the occupants of the neighbourhood, but considering the judgment as a whole, I am of opinion that the learned Magistrate did not find that there was a public nuisance likely to be created by the user of the stables but a private nuisance which he had jurisdiction to abate under S. 515.

Coming to the judgments of the Appeal Court, although, particularly in the Acting Chief Justice's judgment there are certain remarks which might be construed as referring to the residents of the locality, the judgments as a whole are devoted to the consideration of the question whether the user of the stables would result in a nuisance to the residents of the bungalow of whom the complainant was one. The words in which the learned Chief Justice finds on the question of nuisance are these (p. 1326): "I hold that it is a nuisance with reference to the residents of this house in relation to the particular circumstances of the case. I do not say generally that any stables properly licensed, and kept according to the terms of the license, would necessarily be a nuisance. My finding has relation to the particular facts of the case including the situation of the stables and the extent to which the stabling accommodation is allowed on this land." This conclusion to which the learned Judges of the Appeal Court came is further made quite clear from their appreciation of the evidence on the complainant's behalf to the effect that the danger of malaria was increased in the locality. There was a divergence of medical evidence on the point, but so far as I can see the Judges of the Appeal Court were inclined to hold that the evidence did not prove the contention of the complainant and of the other residents of the locality that malaria was increased in the locality by reason of the user of these stables. If the ground of malaria was eliminated no other ground remained for holding that it was a public nuisance. I have gone through the whole evidence in that case. One Niblett, who resided in the house of Ismailji, and Nazir, who occupied another house, which two houses are the nearest to the stables next to the bungalow in question, say that they suffered discomfort on account of smell and noise. Their evidence, however, was very perfunctory, and the Judges of the Appeal Court do not speci-

(4) [1915] 40 Bom. 401=93 L. C. 192=17 Bom. L. R. 1040.

tically refer to it at all and have not brought their mind to bear upon those statements. It is a very doubtful question whether, assuming two or three houses were affected, it would be a case of public nuisance. I find in Halsbury's Laws of England, Vol. XXI, at page 511, where public and private nuisances are defined, in the note (k), that where a noise caused by a tinman plying his trade affected three houses only, it was held that there was a private nuisance and not an indictable one. The case referred to is *R. v. Lloyd* (5). Therefore, even if these two houses were affected practically by this nuisance, it might not amount to a public nuisance. The Judges of the Appeal Court did not particularly consider the case from the point of nuisance being created in respect of the residents of the locality. As I stated, the question of the residents of the locality appears to me to have been dismissed from consideration by the Appeal Court on the ground that the evidence did not show that there was increase of malaria or that there was likelihood of increase of malaria. The judgment of Mr. Justice Crump, the other Judge of the Appeal Court, is to my mind equally clear on the question of the stables not affecting the other residents of the locality. He considers at some length the question of increase of malaria and he discards the evidence of the other residents of the locality as evidence of no value at all.

There are further indications given in the judgments of both the Appeal Court Judges that they were merely considering the case of the residents of the particular bungalow. It appears from the judgments that they tried to bring about a compromise and find a middle way of solving the dispute between the residents of the house in question and the owner of the stables, and they express their regret that both the parties were fighting the matter so bitterly that they would not consider the suggestion of a middle way. One party insisted on the issue of the license, while the other wanted to prevent it absolutely and neither was willing to give up its extreme contention. Now to my mind, if the nuisance was considered by the Court to be a public nuisance, there would have been no ground at all for a compromise between the complainant and the owner of these stables.

As observed by Mr. Justice Holmwood in *Khagendra Nath Mitter v. Bhupendra Narain Dutt* (6) the Court ought most strongly to deprecate the use of the Municipal Act for the purpose of interfering in any way with the rights of private ownership beyond those limited powers which the Corporation had obtained by statute for the necessary protection of the public and the enforcement of proper sanitation. I entirely agree with these observations, as after all in a big city like Bombay one cannot omit the consideration of the rights of ownership which might be affected to a very large extent by any hasty and improper action of the Commissioner or the Corporation or the Court. No doubt, if the user of the stables was in fact found to be a nuisance in respect of houses other than the bungalow, it was open to the Court and it would have been right for the Court, to find that the nuisance did not relate merely to the particular bungalow but to other houses also. If they thought that the nuisance related to the whole locality it was a public nuisance but if it related to the bungalow, in question it was a private nuisance. The relief which the Court can give in both cases under S. 515 is *inter alia* abatement of the nuisance by ordering the Commissioner not to grant the license for the stables. But it does not follow from the Court's making an order on the Commissioner that he should not grant a license that that order is to govern all circumstances and all cases at all times. Mr. Desai argued that if the order was meant to cover any larger area than the bungalow, such area ought to have been defined in the judgments of the Magistrate and the Appeal Court. I have looked through a good many cases of nuisance and I do not find anywhere that any limitation as suggested by Mr. Desai has been put and for the obvious reason because it would be very difficult in particular cases to demarcate any particular line. The law has, therefore, provided two very proper demarcating lines which are clear and on which there can be no discussion, and that is dividing nuisances into private and public nuisances. With regard to a private nuisance, each individual has his remedy in civil law by way of injunction and damages. He has further his remedy under S. 515 of the

(6) [1910] 38 Cal. 296=15 C. W. N. 316=8 I C. 530=11 Cr. L. J. 665.

(5) [1802] 4 Esp. 200.

Municipal Act as interpreted by the Appeal Court and by the Calcutta High Court in two cases arising under a similar provision in the Calcutta Municipal Act: *Bhagwan Das v. Rash Behari Mullick* (7) and *Khagendra Nath Mitter v. Bhupendra Narain Dutt* (6). It is necessary for the protection of the health and comfort of the inhabitants of a big city like Bombay or Calcutta that any resident, who is affected by nuisance in the manner mentioned in S. 3 (z) of the Municipal Act, should have a right to go to a Magistrate over the head of the Commissioner or the Corporation and ask that the Commissioner should be restrained from exercising his powers so as to affect the complainant's individual right as resident by the creation of a private nuisance. If private nuisance affects two or three houses, the inhabitants of the two or three houses might either join in a civil suit or they might file separate suits, or they might join in a complaint before the Magistrate and ask the Magistrate to decide specifically that the particular nuisance is a private nuisance affecting the residents of houses A, B and C. With regard to a public nuisance also, any resident of Bombay can ask for an order under S. 515, and if the Court finds a public nuisance proved, the order of the Court would give relief to the public of the locality as against the nuisance and vacating of any one or more houses would not mean an abatement of the nuisance, in respect of the public. In the case of a public nuisance no particular limits need be defined.

I have looked through various cases of public nuisance and I find that carrying on of obnoxious trades has been held in some cases to be a public nuisance. As to keeping of animals, under which the user of stables would come, I also find observations in Halsbury's Laws of England, Vol. XXI, at page 513 to the following effect:

"The keeping of any animals in such a position or in such circumstances as to cause material discomfort or annoyance to the public in general, or to a particular person, is a nuisance. If it affects the public generally, it is a public nuisance, and may be punished by indictment or restrained by proceedings taken by the Attorney General; if it violates private

rights only, it is actionable by the individual who is thereby injured."

I have gone through all the cases I could find on the question of nuisance created by stables, and I do not find a single case where it has been held that the keeping of animals in a stable was a public nuisance. It may be that if a person keeps a very large number of horses and the locality is very thickly populated, it may cause discomfort, annoyance and injury to health, not only to the residents of two or three houses but of a much larger number of houses. In that case it would be a public nuisance. But I particularly wish to emphasise the fact that it was open to the Appeal Court, if it came to that conclusion, to hold that there was a public nuisance. It does not do so. The Appeal Court held that a private nuisance was created which affected the residents of the bungalow only. The private nuisance to the residents of the bungalow no longer exists as the bungalow is not tenanted and is not to be used any more for purposes other than those connected with the stables.

That being the case, to my mind, the applicant is entitled to the relief claimed by him.

I need not go in detail into the various decisions, but the decisions as to stables, which are referred to by Mr. Justice Crump in his judgment, all relate to private nuisances, and the case in point, as regards public nuisance created by the carrying on of an obnoxious trade, is *Attorney-General v. Cole & Son* (8). I may mention here that in the English Public Health Acts there are similar provisions for the abatement of nuisances, and the provisions apply both to public and private nuisances. There also, therefore, the order passed under summary jurisdiction would be interpreted on the basis of the finding of the Court as to whether the nuisance was a private nuisance or a public nuisance.

In the case of a public nuisance there is a special remedy provided in the Civil Procedure Code. Under S. 91 of the Civil Procedure Code, the Advocate-General, or two or more persons having obtained his consent in writing, may institute proceedings for abatement of a public nuisance. There is, further, a

(7) [1909] 14 C. W. N. 687=6 I. C. 595.

(8) [1901] 1 Ch. 255=70 L. J. Ch. 118=83 L. T. 725=65 J. P. 88.

provision in S. 268 of the Indian Penal Code in respect of a public nuisance. There "public nuisance" is defined as an act or an illegal omission which causes any common injury, danger or annoyance to the public or to the people in general who dwell or occupy property in the vicinity, or which must necessarily cause injury, obstruction, danger, or annoyance to persons who may have occasion to use any public right. I refer to these provisions, because I find from what Mr. Campbell very properly brought to my notice that the inhabitants of the locality have been under the impression, the same impression as conveyed by the Municipal Commissioner to the applicant and which necessitated these proceedings, that the order of the Appeal Court protected all the inhabitants of the locality in respect of this nuisance. Probably they financed that litigation and backed up the complainant, Mr. Mallandaine, in the belief that if he succeeded, there would be an end of the matter. They did not count upon the ingenuity of the landlord, who got the particular house vacated and got the nuisance in respect of that particular house abated in a manner which was not contemplated by the other residents of the locality. I have looked at the plans put in that case and I find that the two nearest houses next to the bungalow in that case are the houses of Ismailji and of Nazir.

I express no opinion whatsoever as to whether the user of these stables will result in discomfort or annoyance amounting to a nuisance as defined in S. 3 (2) of the Municipal Act, or whether there will be a nuisance at law actionable in this Court, as a private nuisance in respect of any house or houses other than the bungalow, or whether it will result in a public nuisance which would be indictable under S. 268 of the Indian Penal Code, or actionable under S. 91 of the Civil Procedure Code. It may be that the residents of the locality may make a fresh effort and succeed perhaps so as to lay the matter at rest for all time. But unfortunately for them the Courts which considered that case confined their orders to the bungalow, and did not hold there that a case of public nuisance was made out. The result is that if these parties are so advised there will be possibly further litigation in this matter. I do not want in any way to debar any resident or

residents of the city of Bombay from taking proceedings under S. 515 of the Municipal Act or under the civil law, or under S. 91 by moving the Advocate-General, or under S. 268 of the Indian Penal Code.

At one time I proposed to order the Municipal Commissioner not to issue the license for a period of one month; but, as pointed out both by Mr. Campbell and Mr. Desai, such an order will really serve nobody's purpose. If the other residents of the locality, or whoever may be affected by the user of these stables, are so advised, they will have ample time to move the Magistrate, or file a suit in this Court and move for an injunction and obtain adequate relief. The applicant had these stables on his land for a long time and he has asked for a license again with his eyes open that other residents may have a cause for complaint and may again drag him to the Presidency Magistrate's Court under S. 515 of the Municipal Act. I trust that the Municipal Commissioner will not unduly hasten the grant of the license. The applicant will have no ground to complain if the issue of the license is delayed for a fortnight or any time which the Municipal Commissioner may think proper so as to give the other parties an opportunity of asserting their rights if they have any. I must say that the Municipal Commissioner has adopted a very proper attitude in bringing to my notice the letters addressed to him by the residents of the locality. Under the circumstances of the case, to my mind, he did right in getting this question brought before the Court and decided by the Court, more particularly as he was advised by eminent counsel who are the retained counsel of the Municipality, that there would be a contempt of Court if he issued the license in face of the Appeal Court's decision. It is unfortunate that the matter may have to be re-litigated; but that cannot be helped in view of the judgments of the Appeal Court. I have not considered the question whether the stables might be a nuisance with regard to the other houses or other residents of the locality, and I express no opinion on the question. I wish to make this point quite clear so that it may not be said that the Commissioner uses his discretion under my orders, and that therefore the other parties are debarred from moving under S. 515 of the Municipal Act or tak-

★ 1925 BOMBAY 4 65

MACLEOD, C. J., AND CRUMP, J.

Taribai Ramrao Putankar—Plaintiff—Appellant.

v.

Dattaram Govindbhai Gujar—Defendant—Respondent.

Second Appeal Nos. 76 of 1923, and 558 of 1922, Decided on 15th December 1924, from the decision of the Sub J., Satara, in Appeal No. 68 of 1921.

★ *Adverse possession—Equity of redemption cannot be acquired by adverse possession—Possessory mortgage—Trespasser in possession holds adversely to mortgagee and not mortgagor.*

A possessory title to property can only be acquired by physical possession which ripens into ownership by the failure of the true owner to take steps to recover possession. Though a trespasser by holding possession against the mortgagor can bar the mortgagor's right to redeem, it cannot be said that an equity of redemption can be acquired by adverse possession of the mortgaged property. In the case of a possessory mortgage where possession has been delivered to the mortgagee, a trespasser obtaining possession may hold adversely to the mortgagee, but not to the mortgagor. 14 Bom. 176 and 18 Bom. 51 Ref. [P 465 C 1, 2]

G. N. Thakor and *P. B. Shingne*—for Appellant.*H. C. Coyajee* and *K. N. Koyajee*—for Respondent.

Macleod, C. J.—The main facts in this appeal are common to S. A. 683 of 1922 and need not be set out again. The heirs of Vinayak filed the suit to recover possession of the other half of the Vatan lands. After the final decree in the suit of 1896 was passed in April 1912 Vinayak obtained possession of his half-share in July 1913. In August 1916, Tarabai, in execution of her decree against Antaji, dispossessed the tenants of Vinayak as well. Jankibai, widow of Vinayak's uncle, sought to recover possession, but her application was rejected in 1916. After her death her granddaughter filed this suit against Tarabai making Vinayak's grandson and nephew party defendants.

The trial Judge held that the validity of the mortgage ceased at the death of Hanmantrao, and Parchure, who was then in possession, became a trespasser. But the plaintiff did not claim through Parchure and until July 1913 neither they nor their predecessors had any possession at all. From July 1913 they had only

ing proceedings under the Civil Procedure Code, or taking criminal proceedings. My order is based entirely on the view I have taken that the Commissioner illegally declined to use his discretion on the ground that he was restrained by the Appeal Court's order. I hold that he is not so restrained; therefore the refusal to exercise his discretion was on an illegal ground. That is all that I decide on this application.

As to whether he has otherwise rightly exercised his discretion or not, is a matter for the Municipal Commissioner and persons affected by the exercise of the discretion. I have not exercised any discretion in the matter. I have not gone into the merits of the question whether apart from the decision of the Appeal Court the Commissioner would be right in exercising his discretion and issuing a license to the applicant. What I mean is this: in exercising his discretion the Commissioner has to consider whether this would be a nuisance to the other residents of the locality and whether under the circumstances he should grant the license or not. On that point his opinion, as expressed in his affidavit before me, is clear that there would be no nuisance, and that he is willing, in the exercise, of his discretion to grant a license. I am not exercising that discretion at all. I leave open the remedies under S. 515 of the Municipal Act and under the civil and criminal law to any party who may feel aggrieved by the exercise of the discretion by the Commissioner.

The order will be on the Municipal Commissioner in terms of prayer (2). I direct the Municipal Commissioner in the exercise of his discretion to grant the applicant a license under S. 394 (1) (c) of the Municipal Act.

In my opinion the Municipal Corporation has been wrongly made a party to this application.

The applicant shall pay the costs of the respondents.

Order accordingly.

symbolical possession. As Tarabai sued Parchure for possession and was successful, plaintiff's right to possession also ceased. Consequently the suit was dismissed. The appellate Judge agreed with this decision except that he found that the Agashes obtained possession in 1913.

In appeal before us it was argued that the Agashes had acquired a title by adverse possession to a moiety in the suit lands. Now Antaji Parchure was in possession as sole mortgagee till it was declared in the suit of 1896 that the assignment of Dattaram's share in the mortgage was void, and it was further held that the mortgage had been paid off. If Antaji could have been considered as holding adversely to the the next heir of Hanmantrao, while holding possession as mortgagee, any suggestion of that sort is put an end to

(1) by the finding that the mortgage was paid off so that the owners of the equity of redemption became entitled to possession under their purchases;

(2) by the decision in Tarabai's suit against Antaji.

It was faintly argued that Antaji must be considered as having been in possession of half the mortgaged lands in trust for Dattaram and consequently that Dattaram had acquired some interest by adverse possession. But this was an impossible argument. There could be no question of trust while Antaji was holding under the assignment in his favour; when that was set aside he became liable to account for half the profits.

But it was argued that the Agashes had acquired a title to the equity of redemption by adverse possession. It is difficult to see how a person can be in possession of an equity of redemption adversely to the true owner. A possessory title to property can only be acquired by physical possession which ripens into ownership by the failure of the true owner to take steps to recover possession. It is true that it appears to have been considered in *Puttappa v. Timmaji* (1) that an equity of redemption can be acquired by adverse possession, but in that case Narsibai actually delivered possession to her vendee Ramappa in 1856, and it was contended that the plaintiff's suit was barred by his adverse possession for more than twelve years, and consequently it did not become

necessary to determine what right Narsibai had when she sold. In *Chinto v. Janki* (2) it was held that there may be possession adverse to the interest of a mortgagee which nevertheless is not adverse to the interest of the mortgagor. *Puttappa v. Timmaji* (1) was considered, and I think that though a trespasser by holding possession against the mortgagor can bar the mortgagor's right to redeem, it cannot be said that an equity of redemption can be acquired by adverse possession unless the person claiming is in physical possession of the mortgaged property. In the case of a possessory mortgage, where possession has been delivered to the mortgagee, a trespasser obtaining possession may hold adversely to the mortgagee, but not to the mortgagor. Since Tarabai must be considered as the only person with a title other than possessory to the moiety in suit she is entitled to succeed against the plaintiffs who are out of possession unless they can show not only that her rights have been extinguished but that they have already acquired a good title. But at the most they obtained possession in July 1913 and retained it for two years. It is impossible, therefore, to say that they have a right to oust Tarabai, and in my opinion the decree in her favour was correct and the appeal should be dismissed with costs.

Crump, J.—This is a suit by the heirs of Agashe against Tarabai. As regards this moiety of the lands Agashe's heirs hold the rights of both mortgagor and mortgagee by virtue of the order of the High Court in 1907. The question is whether they or those through whom they claim have acquired any title by adverse possession. It is obvious that on Hanmantrao's death in 1897 any alienation by him became null and void, but it may be that persons who remain in possession after that date could acquire a title by prescription against the heirs of Hanmantrao who were at that date entitled to immediate possession. It is necessary, therefore, to consider the possession of the lands from 1897 onwards.

If I apprehend the position correctly the only persons who could acquire any title by adverse possession would be the persons in actual possession of the lands. The actual possession up to 1913

(1) [1889] 11 Bom. 176.

(2) [1892] 18 Bom. 51.

was with Parchura. Up to 1907 the heirs of Agashe held one-half of the equity of redemption, and in 1912 they became the full owners, but they got no possession until 1913. If the possession of Parchura as mortgagee was adverse to the heirs of Hanmantrao, they might have become entitled to hold as mortgagees, but from 1907 their possession was also adverse to the heirs of Agashe whose share was then declared free of the mortgage. It is difficult, therefore, to see how the heirs of Agashe could acquire a title by adverse possession, and as between Parchura and the heirs of Ramrao the matter is concluded by the suits of 1912. As regards the suggestion that there was adverse possession of the equity of redemption it is clear that Agashe's heirs could not hold that equity adversely when they were never in physical possession of the property. As matters stood Hanmantrao's heirs could not at any time have sued the heirs of Agashe alone as holders of the mere right to redeem.

Appeal dismissed.

1925 BOMBAY 467

MIRZA AND PERCIVAL, JJ.

Gulabchand Rupji—Accused No. 1—Applicant.

v.

Emperor—Opposite Party.

Criminal Application for Revision No. 76 of 1925, Decided on 12th June 1925, against an order of the Resident Magistrate, Nadiad.

Criminal, P. C., S. 195 (c)—Document tendered but returned by presiding Judge is 'produced in evidence'.

Where a party to a proceeding hands up a document to the Judge who does not take the document on the file but returns it to the party, the document is "produced" in the proceeding, within the meaning of S. 195 (c). No complaint with reference to the document can be entertained by a Criminal Court, in the absence of a complaint in writing by the Court concerned.

H. C. Coyajee and H. M. Chokshi—for Applicant.

S. S. Patkar—for the Crown.

Mirza, J.—This is an application in revision on behalf of the accused against an order of the Resident First Class Magistrate, Nadiad, who rejected the accused's application to quash certain

criminal proceedings pending in his Court under Ss. 467 and 109, Indian Penal Code, against the accused.

The contention of the accused is that a document in respect of which a charge of abetment of forgery is made against him in those proceedings was 'produced' before the Extra First Class Subordinate Judge of Surat in the Civil Suit No. 529 of 1922, that any prosecution against him in respect of such a document can be instituted only on a written complaint of the Subordinate Judge, and admittedly as there is no written complaint the present proceedings are irregular and should be quashed.

It appears that the accused was the defendant in Civil Suit No. 529 of 1922. The plaintiff in that suit had obtained a decree against the accused and had filed a darkhast in the Extra First Class Subordinate Judge's Court for execution of that decree. In answer to that darkhast the defendant had produced the document in question and had handed up the same to the Subordinate Judge. That document purported to show that the decree had been compromised for a payment of Rs. 1,500. The Subordinate Judge did not take the document on the file on the ground that the date it bore showed that it was out of time for the purpose of evidencing any compromise of the decree. In doing so the learned Subordinate Judge failed to observe the provisions of Order 13, R. 6, Civil Procedure Code, which lays down:

"Where a document relied on as evidence by either party is considered by the Court to be inadmissible in evidence, there shall be endorsed thereon the particulars mentioned....."

The learned Subordinate Judge returned the document to the pleader of the accused. It is now alleged that that document is being suppressed by the accused and is therefore not forthcoming. Under these circumstances the question before us to decide is whether what happened before the Subordinate Judge was tantamount to the 'production' of the document in question within the meaning of S. 195, clause (c), of the Criminal Procedure Code. That section provides:

"195 (1) No Court shall take cognisance.....(c) of any offence described in S. 463 or punishable under S. 471, S. 475 or S. 476 of the same Code (Indian Penal

Code) when such offence is alleged to have been committed by a party to any proceeding in any Court in respect of a document produced or given in evidence in such proceeding, except on the complaint in writing of such Court, or of some other Court to which such Court is subordinate."

Reliance is placed by the learned counsel for the accused upon O. 7, R. 14, as showing that production of a document is different from giving the document in evidence. O. 7, R. 14, Civil Procedure Code, provides:

"Where a plaintiff sues upon a document in his possession or power, he shall produce it in Court when the plaint is presented, and shall at the same time deliver the document or a copy thereof to be filed with the plaint."

Like O. 7, R. 18, O. 7, R. 14 contemplates that a record of the document or its copy should be kept in the Court when it is said "to be produced" although it may not be given in evidence.

Our attention has been further called to *Queen-Empress v. Nagindas* (1) where a Division Bench of this Court consisting of Birdwood and Jardine, JJ. held that a document is given in evidence within the meaning of S. 195, Criminal Procedure Code, when it is handed over by the person tendering it to the Court though the Court on inspection may reject it as evidence, for insufficiency of stamp or want of registration. This decision was prior to the date of the amendment of the Criminal Procedure Code whereby the words "produced or" have been added.

Our attention has been further called to a decision of the Calcutta High Court in *Nalini Kanta Laha v. Anukul Chandra Laha* (2). That case decided that where a document was called for by a party to a proceeding under S. 145 of the Criminal Procedure Code, brought into Court and referred to by his pleader in argument and by the Magistrate in his judgment, though he expressly refrained from any opinion as to its authenticity, the document was "produced" in the proceeding within the meaning of S. 195 (1) (c) of the Code.

We are further referred to a more recent case of our own Division Bench in

In re Gopal Sidheshvar (3). In that case Chandavarkar and Pratt, JJ. held that S. 195 (c) of the Criminal Procedure Code, 1898, applied to a document which was alleged to be forged and was produced in a Court of Justice. "Production" of a document in Court, they say, is not the same as "giving it in evidence." A document produced in Court according to this decision means "one which is produced for the purpose of being tendered in evidence or for some other purposes." We are of the opinion that this interpretation of S. 195 (c) is binding upon us. The circumstances in that case were very similar to the circumstances in the present case.

In a still more recent judgment in *In re Bhau Vyankatesh* (4) Macleod C. J. and Coyajee, J. have given the same wide interpretation to the word 'produce'.

We, therefore, make the rule absolute and quash the Magistrate's proceedings in the matter of the complaint against the applicant. This order, however, will not preclude fresh proceedings being instituted after a complaint is made in writing by the learned Subordinate Judge which in his discretion he is competent to do.

Percival, J.—I agree in regard to the legal aspect of the case. I should like to add that, while it will be a matter of discretion for the learned Subordinate Judge whether to make a complaint or not, in the peculiar circumstances of the case it appears that the complaint by the Subordinate Judge is rather a formality, owing to the fact that, although the document was technically produced in his Court, it was not retained there; and therefore the Subordinate Judge will probably not find anything on his record regarding it. It is even a question whether the document is in existence now or not. Thus, while on technical grounds the complaint by the Subordinate Judge is necessary, it cannot be expected that he will have any personal knowledge of the subject under consideration.

Rule made absolute.

(1) [1886] Unrep. Cr. C. 242.

(2) [1917] 44 Cal. 1002=25 C. L. J. 255=21 C. W. N. 640=39 I. C. 490=18 Cr. L. J. 522.

(3) [1907] 9 Bom. L. R. 735=6 Cr. L. J. 78.

(4) 1925 Bom. 433=27 Bom. L. R. 607.

★ 1925 BOMBAY 469

TARAPOREWALA, J.

Vallabhdas Meghji—Petitioner.

v.

Cawaji Framji & Co.—Opposite Party.

In re Specific Relief Act 1 of 1872 and
Re. Stables of Hack Victorias, D - 13th
February 1995.

★ *Arbitration Act, S. 9 (a) and (b)* — Reference to two arbitrators one by each party — Arbitrators refusing to act, each party has right to appoint another in place of its retiring arbitrator—On refusal by one party other party can appoint sole arbitrator.

S. 9 provides for supplying vacancy in case where the submission provides that reference shall be to two arbitrators, one to be appointed by each party. Under S. 9 (a), where both arbitrators refuse to act each party has a right to appoint an arbitrator in the place of the arbitrator appointed by that party, and if one party so appoints and the other party refuses to appoint an arbitrator in place of his arbitrator, the provisions of sub-section (b) would come into force and the party so appointing would be entitled, after giving notice to the other party, to appoint his own arbitrator as sole arbitrator. [F 469 C 2]

B. K. Desai—for Petitioner.*Mulla*—for Opposite Party.

Taraporewala, J.—In this matter the petitioner prays that the appointment of Vithaldas Damodar Govindji as sole arbitrator under S. 9 (b) of the Indian Arbitration Act made by the respondents may be set aside and that it may be declared that the power of appointing arbitrators under the partnership agreement having once been exercised by both the partners has been exhausted and that reference to Vithaldas Damodar Govindji be revoked. In the alternative the petitioner asks that a fit and proper person nominated by the petitioner may be appointed as an arbitrator on petitioner's behalf to act along with the said Vithaldas Damodar Govindji.

The whole argument as to the revocation of the appointment of Vithaldas Damodar Govindji is based on S. 9 of the Indian Arbitration Act. It has been argued that that section applies only where one of the arbitrators dies or becomes incapable or refuses to act, but that where both the arbitrators refuse to act, the arbitration comes to an end and that there is no power in the parties or in Court to appoint other arbitrators in place of the arbitrators so refusing to act.

In this case it appears that the arbitrators, after proceeding for about eighteen months, declined to act any further. Thereupon, after some time, the respondents appointed Mr. Vithaldas Damodar Govindji as their arbitrator and called upon the petitioner to appoint his arbitrator under S. 9 (b), and as the petitioner refused to appoint his arbitrator, the respondents appointed Vithaldas Damodar Govindji as sole arbitrator in the matter under S. 9 (b).

The construction of S. 9, to my mind, is quite clear. It provides for supplying vacancy in case where the submission provides that reference shall be to two arbitrators, one to be appointed by each party. The previous section provides for supplying vacancy in case where the submission is to one arbitrator, umpire or third arbitrator. S. 9, clause (a) speaks of "either of the appointed arbitrators refusing to act, etc." That means only that when two arbitrators are appointed, one by each party, the right of appointing another arbitrator in place of the arbitrator refusing to act, etc., lies with the party appointing him and not with both the parties. The meaning which is tried to be put upon S. 9, sub-clause (a), that the right of a party to appoint an arbitrator in place of the arbitrator appointed by that party who refuses to act, etc., cannot be exercised if the other arbitrator refuses to act, seems to me not the proper construction of the clause at all. The word 'either' is used because it may happen that one or both of the arbitrators may refuse to act, etc. In that case each party has a right to appoint an arbitrator in the place of the arbitrator appointed by that party, and if one party so appoints and the other party refuses to appoint an arbitrator in place of his arbitrator, the provisions of sub section (b) would come into force and the party so appointing would be entitled, after giving notice to the other party, to appoint his own arbitrator as sole arbitrator. Therefore, the petition fails on the first two grounds.

As regards the alternative ground, it was conceded by the respondents that they were willing to have another arbitrator appointed by the petitioner to act with Vithaldas Damodar Govindji.

I, therefore, set aside the appointment of Vithaldas Damodar Govindji as sole arbitrator made under S. 9, and I order that the said Vithaldas Damodar Govindji

ji should act with an arbitrator nominated by the petitioner within a fortnight.

The said two arbitrators to proceed with the arbitration.

Order set aside.

★ ★ 1925 BOMBAY 470

MACLEOD, C. J., AND COYAJEE, J.
Kathu Jairam Gujar—Appellant.

v.

Vishvanath Ganesh Javadekar and others—Respondents

First Appeal No. 336 of 1923, Decided on 8th March 1925, from the decision of the First Class Sub-J., at Dhulia, in Civil Suit No. 278 of 1922.

★ ★ (a) *Contract Act, S. 24—Agreement by client to pay to pleader a sum of money and part of suit property as inam for religious purposes.*—*Agreement is inseparable and whole is void.*

A client executed a bond in favour of his pleaders as follows: "I have this day given you a vakilpatra in the above suit and agree to give you both Rs. 500 as inam or reward in case you obtain full success for me in this or in the High Court, and would further give over to you possession of survey No. 58 for religious or charitable purposes." Survey No. 58 was part of the property in dispute in the suit.

Held: that the agreement to give land to the pleaders though for religious or charitable purposes was void, and as it cannot be separated from the agreement to give them Rs. 500 for their services in the case as pleaders the whole agreement is void under s. 24. [P 470 C 2]

★ ★ (b) *Contract Act, S. 23—Pleader agreeing to take as fees part of suit property in case of success—Agreement is void.*

An agreement taken by a pleader that he shall be given part of the property in dispute in the suit in which he is engaged must necessarily be contrary to public policy and therefore unlawful under S. 23. 4 C. L. J. 259 and 32 Bom. 449 Appr. [P 471 C 1]

*K. H. Kelkar—*for Appellant.

*P. V. Kane—*for Respondents.

Macleod, C. J.—The plaintiff stated in his plaint that he and one Shankar Shrikrishna Deo were engaged as pleaders by defendant No. 1 in Suit No. 273 of 1917 filed against him in the Court of the First Class Subordinate Judge of Dhulia by one Bhagwan Davidas; that on September 23, 1917, when the *vakilpatra* was given to them, defendant No. 1 made a special contract in the following terms:

I have this day given you a *vakilpatra* in the above suit and agree to give you both Rs. 500 as inam or reward in case you obtain 'full success' for me in this or in the the High Court, and would further give over to you possession of survey No. 58 of Shahada comprising

3 acres and 36 gunthas and assessed at Rs. 30, for religious or charitable purposes."

It is admitted that Survey No. 58 was part of the property in dispute in the suit. The suit was dismissed in the first Court on March 22, 1919, but in the first appeal the High Court granted relief to the plaintiff with regard to a portion of his claim.

The trial Judge held that the agreement to give Rs. 500 as *inam* or reward in case the pleaders obtained "a full success" could be enforced. But with regard to the obligation on the first defendant to give away to the pleaders the lands for charity, he thought the claim was not sustainable.

The question then arose whether under S. 24 of the Indian Contract Act, the agreement was void because one of several considerations for a single object was unlawful. The Judge said:

"As it was not a reward given to them for their professional services, the clause of the *inam Chitti* relating to it becomes a distinct agreement by itself, and is to that extent void for want of consideration. In fact, it operates as an agreement to make a gift of the land rather than an agreement to make a transfer of it for value. Further as the religious and charitable purposes have not been defined, the beneficiaries who are to take under it cannot be ascertained, and the agreement being thus too vague and uncertain cannot be specifically enforced under S. 21 of the Specific Relief Act."

It is difficult to see how it can be said that the agreement to give land to the pleaders for religious or charitable purposes can be separated from the agreement to give them Rs. 500 for their services in the case as pleaders. It has been suggested that because the property was to be given over to religious or charitable purposes, it could not be considered as consideration given to the pleaders for their services in the suit. I do not think the Court need be misled by such an argument. It was intended to be a gift of the property to the pleaders, leaving it open to them to deal with it as they thought fit. The words "for religious and charitable purposes" were evidently added in the hope that the real object of the agreement might be concealed. But we think it clear that the consideration for the services of the

pleaders in the case was Rs. 500 and the gift of part of the property in suit. An agreement taken by a pleader that he shall be given part of the property in dispute in the suit in which he is engaged must necessarily be contrary to public policy, and therefore, unlawful under S. 23 of the Indian Contract Act. "It is professional misconduct for an advocate to stipulate for or agree with his client to accept as his fee or professional remuneration a share of the property, fund, or other matter in litigation for his services as advocate in such litigation upon the successful issue thereof." [See *In the matter of an Advocate* (1)]. In *Laxmanlal v. Mulshankar* (2), a pleader stood bail for his client pending a criminal charge against him, and as an indemnity for the bail took from him a sale-deed and a rent-note regarding his house, in the name of the plaintiff. The consideration for the sale-deed was a sum of Rs. 8,000, of which Rs. 5,000 were the indemnity for the bail-bond, and the remaining Rs. 3,000 represented the advances to be made thereafter by the plaintiff. The plaintiff sued on the rent-note to recover the sum of Rs. 2,000 as rent; and it was held (1) that the contract for indemnifying the pleader for his bail-bond was illegal; and this illegality rendered the sale-deed void in law; (2) that the rent note was tainted with the same illegality which affected the sale-deed and could not stand on any separate footing; and (3) that the agreement was an indivisible agreement. A part of a single consideration for one object was unlawful, and, therefore, the whole agreement was void under S. 24 of the Indian Contract Act, 1872.

In the same way in this case the agreement to pay Rs. 500 cannot be separated from the agreement to give survey No. 58, part of the property in suit. We think, therefore, that the whole agreement was void. We allow the appeal and dismiss the plaintiff's suit with costs throughout.

Coyajee, J.—I am entirely of the same opinion.

Appeal allowed.

★ 1925 BOMBAY 471

MACLEOD, C. J., AND CRUMP, J.
Vallabhdas Kanji—Applicant.

v.

Ranchhordas Mathradas — Opposite Party.

Application in O. C. J. Appeal No. 18 of 1920 Decided on 9th April, 1925, and Suit No. 1717 of 1919.

★ *Civil P. C., S. 35—Privy Council Appeal presented but not prosecuted—Costs on petition for leave to appeal to Privy Council are to be paid by appellant.*

Where a party obtained leave to appeal to the Privy Council, but took no steps to prosecute the appeal after the record reached there, and the appeal was thus dismissed for non-prosecution,

Held: that the respondents were entitled to the costs incurred by them in the High Court on the petition to obtain a certificate for leave to appeal. [P. 472, C. 1]

Lalji—for Appellant.

Munshi—for Respondent.

Macleod, C. J.—In this case leave to appeal to the Privy Council was obtained by the defendants. Thereafter they took no steps to prosecute the appeal, and on October 18, 1923, the Registrar of the Privy Council addressed a letter to this Court as follows:—

"I have the honour to inform you that the appellants have taken no steps in prosecution of the above appeal although four months have now elapsed since the date of the arrival of the record in England, and that by virtue of rule 34 of the Judicial Committee Rules 1908, the said appeal stands dismissed for non-prosecution as from today without further order.

"I have accordingly to request you to be good enough to bring this communication before the Judges of your Court, in order that the necessary steps may be taken to terminate the proceedings."

Nothing further has been done. Therefore, it would be necessary for this Court to give directions in accordance with the Registrar's letter with regard to the costs of the application for leave to appeal to the Privy Council. Those costs had been made costs in the appeal. As the appeal was dismissed for non-prosecution without further order of the Privy Council, no order was made with regard to those costs. It makes no difference that the petitioners applied to the Privy Council for restoration of the appeal. That petition failed, and the petitioners were directed to pay the taxed costs in England of the respondents opposing the petition.

(1) [1906] 4 C. L. J. 259.

(2) [1908] 82 Bom. 449=10 Bom. L.R. 553.

We are, therefore, restored to the original position at the time the Registrar's letter of October 18, 1918, reached this Court. We think that as the appellants took no further steps to prosecute the appeal, the respondents were entitled to the costs incurred by them in this Court on the petition filed by the appellants to obtain a certificate for leave to appeal to the Privy Council. That order would include the costs of the present application. The respondents are not entitled to the costs of the appearance before Mr. Justice Taraporewala.

Petition allowed.

1925 BOMBAY 471 (1)

MACLEOD, C. J., AND COYAJEE J.

Pandujoti Kadam—Appellant.

v.

Savla Piraji Kate—Respondent.

Second Appeal No. 203 of 1924, Decided on 24th June 1925, from the decision of Asst. J., Satara, in Appeal No. 472 of 1922.

Execution—Right to Person having no right at the date of application but acquiring the right subsequently cannot execute decree.

A darkhastdar, who has no title whatever to execute the decree at the time of the darkhast, cannot remedy the defect by completing the title after the date of darkhast, and then try to execute the decree by virtue of that title.

[P. 472, C. 1]

S. R. Parulekar—for Appellant.

S. K. Bakhale—for Respondent.

Macleod, C. J.—We think that the decision of the Subordinate Judge was right, and that the authority relied upon by the Assistant Judge has no application. The applicant at the time he presented the darkhast, had no title to the decree which he sought to execute. He had only a right under his own decree to obtain an assignment from the decree-holder of the other decree. The applicant was given time by the Subordinate Judge to cite any authority to support his proposition. He failed to do so. There is no authority that we know of which lays down that a darkhastdar, who has no title whatever to execute the decree at the time of the darkhast, can remedy the defect by completing the title after the date of the darkhast, and then try to execute the decree by virtue of that title.

We allow the appeal and restore the decree of the Subordinate Judge with costs throughout.

Appeal allowed.

1925 BOMBAY 472 (2)

MACLEOD C. J. AND COYAJEE, J.

B. S. Jorapur—Applicant.

v.

Venkatesh Balwant Joshi—Opponent.

Civil Ex. App. No. 164 of 1924 Decided on 2nd July 1925, from the decision of D G. Bijapur in Misc. A. No. 14 of 1923.

Bombay High Court Circulars, Ch. 23, R. 16—Receivers other than official receivers. Receiver's remuneration should be proportional to the amount of dividend distributed—Prov. Ins. Act (1920), S. 56.

R. 16 of Chap. 23 of the Manual of Circulars issued by the Bombay High Court directs that the remuneration of receivers, other than official receivers, shall be in such proportion to the amounts of the dividends distributed as the Court may direct, provided that it does not exceed five per centum of the amount of dividends and therefore, a Court is not justified in directing payment to the receivers at the rate of five per cent on the whole amount realised.

Nilakant Atmaram—for Applicant.

R. A. Jahagirdar—for Opponents.

Macleod, C. J.—The remuneration of receivers, other than official receivers, under the Provincial Insolvency Act must be fixed under rule 16 of Chapter 23 of the Manual of Circulars issued by the High Court, which directs that the remuneration of receivers, other than official receivers, shall be in such proportion to the amounts of the dividends distributed as the Court may direct, provided that it does not exceed five per centum of the amount of dividends.

In this case the Subordinate Judge awarded the receiver's remuneration at the rate of five per cent on the whole amount realised by them. The greater portion of that amount was payable to a mortgagee. Therefore the balance available for paying dividends to creditors was under Rs. 25,000. It is clear, therefore, that the order of the Subordinate Judge directing payment to the receivers at the rate of five per cent on the whole amount realised was not authorised by the rule, and the District Judge was right in holding that the rule should be followed, and that the percentage could only be allowed on the dividends distributed. In any event, it is difficult to see how it could be said that the District Judge, who was following the procedure laid down in the High Court Circulars, was wrong, or that his decision is not in accordance with law. The rule will, therefore, be discharged with costs. *Rule discharged.*

1925 BOMBAY 473

MACLEOD, C. J. AND COYAJEE, J.

Balabhai Raghunath Agaskar and others—Appellants.

v.

Motabhai Babaji Rane and others—Respondents.

O. C. J. Appeal No. 109 of 1924, Decided on 15th April 1925, against the judgment of Mulla, J.

Will—Construction—Grant excluding course of inheritance is void—Estate in perpetuity cannot be created—Right of residence in family house is personal right.

A Hindu settlor in 1889 distributed a large part of his estate between his children and grand-children and settled the remainder of his immovable and moveable properties in trust for himself as long as he lived. He settled on his death one-fourth of the income on his son R during his lifetime and after his death to "all the male heirs" of R, share and share alike. He made a similar provision in favour of his daughter K and her "male heirs," and another daughter P and her "children." In the family house the right of residence was given to R and his "heirs," to K and "after her death her male heirs" and to P and her "children." The settlor died in 1894. K died in 1897 and R died in 1908. K left surviving six sons and R left five sons. They were in existence at the date of the settlement. P died in 1898 leaving behind her a daughter S who was also in existence at the date of the deed.

The plaintiffs, the two sons of R filed a suit for a construction of the trust-deed.

Held: that the family house being not disposed of the right of residence was only a personal right; that S, the daughter of P was entitled to reside during her lifetime in the portion assigned to P, but the right was personal, and on her death, her right of residence would revert to the heirs of the settlor; that on the deaths of R and K the portions of the house which were respectively assigned to them for residence reverted to the settlor's heirs; that the settlement in favour of R and K and their "male heirs" was void as excluding the legal course of inheritance that it was also void as the settlor had intended to create a perpetuity as regards the properties, that the share in the income settled on P would, on the death of S, revert to the settlor's heirs and that the trusts after the deaths of R and K were invalid.

[P 475 C 1, 2 P 476 C 1]

*Kanga—for Appellants.**A. H. Kirtikar, Daphtary, Kania and Bramhandkar—for Respondents.*

Coyajee, J.—The questions in this appeal arise upon the proper construction of a deed of trust executed on May 1, 1889, by a Hindu gentleman, Janardhan

1925 B/60 & 61

Wassodev. The table set out at p. 53 of the paper-book shows the relationship of the persons interested in these questions. The settlor's descendants who were in existence at the date of the said deed were: his son Raghunath; his two daughters Krishnabai and Pootlabai; five sons of Raghunath; six sons of Krishnabai; Anandrao, son of his predeceased daughter; and Sonabai, the daughter of Pootlabai.

The settlor died in the year 1894. Krishnabai died in 1897, all her six sons surviving her; but three of them died between 1912 and 1919. Pootlabai died in February 1898 leaving Sonabai who is a party to these proceedings. Anandrao died in August 1898 leaving a son Venkat. On Venkat's death in 1921, it was held in certain proceedings, to which it is unnecessary to refer in detail, that as he was not in existence at the date of the said trust deed, there was a resulting trust in favour of the settlor's heirs as regards the one-fourth share allotted to Anandrao's branch.

The originating summons which has given rise to this appeal was taken out by the two plaintiffs who are members of Raghunath's branch; they are supported by other members of the same branch. Their contention as set out in paragraph 10 of the plaint is:

"That the gift of the one-fourth share of the rents and income of the male heirs of Krishnabai is invalid in law and on the death of the said Krishnabai there was a resulting trust in respect of the said one-fourth share and the same reverts to the heirs of the settlor, and the plaintiffs with the other heirs have in the events that have happened become entitled to the same in their own right. Similarly the gift of the said one-fourth share of the rents and income to the male heirs of Raghunath is also invalid and on the death of the said Raghunath the plaintiffs with the other heirs of the settlor have become entitled thereto in their own right. The plaintiffs and the other heirs have thus become entitled to three-fourths shares of the said rents and income in their own right."

As regards the one-fourth share of the rents and income allotted to Pootlabai, the learned trial Judge has held that on Sonabai's death there will be a resulting trust in favour of the settlor's heirs; and the matter ends there.

The main contest relates to the one-fourth share of the income allotted to Krishnabai and on her death to her "male heirs."

Before May 1, 1889, Janardhan, the settlor, had distributed five immovable properties and also his jewellery among some of his children and grand-children, leaving him in possession of three landed properties, a number of shares in certain public companies, and one Port Trust Bond. The deed in question recites that Janardhan was desirous of making "the settlement hereinafter appearing," and proceeds:—

"It is witnesseth that in pursuance of the said desire and in consideration of the natural love and affection which the said Janardhan Wasoodev beareth to his children and grand-children hereinafter mentioned, he the said Janardhan Wasoodev doth by these presents, assign transfer and set over unto the said trustees All that, the property and effects...upon the trusts following."

Provision is made as regards rents, dividends and profits of the said properties, except the Breach Candy Road house which is set apart for residence.

The trusts so far as they are now material are as follows:—

"Upon trust to pay the rents dividends and profits arising from the said premises after deducting monthly the sum of Rs. 25 for the payment of taxes and repairs, to the said Janardan Wasoodev or permit him to receive the same during his life and after his decease upon trust out of the said rents dividends and profits to pay one-fourth part of the net amount to Raghunath Janardhan son of the said Janardan Wasoodev during his life and from and after the decease of the said Raghunath Janardan in trust to pay the same to all the male heirs of the said Raghunath Janardan share and share alike and as to one quarter of the said rents dividends and profits upon trust to pay the same to my daughter Krishnabai wife of Ganpatrao Moroji Zaoba during her life for her sole and separate use and after her death in trust for the male heirs of the said Krishnabai share and share alike."

The learned trial Judge held that "the male heirs of Krishnabai, and the heirs of Raghunath are each entitled absolutely to the one-fourth share assigned to Krishnabai and Raghunath respectively"

and that "the persons entitled to the corpus of the one-fourth share assigned to Krishnabai are the surviving sons of Krishnabai and the heirs of her deceased sons."

The plaintiffs and defendants Nos. 4 to 6 (members of Raghunath's branch) have appealed. They contend that the dispositions after the respective deaths of Krishnabai and Raghunath are void for reasons which briefly stated are, that; (1) the "male heirs," of Krishnabai cannot be determined until she died, and they may happen to be persons not in existence at the date of the settlement; (2) the settlor, if he had intended to make a gift in favour of her "sons," would have said so; her sons alone would not necessarily be her "male heirs"; moreover, none of her sons might survive her, and therefore they do not answer to the description of her "male heirs"; (3) the settlor's intention clearly was to confine the inheritance to males; the gift is therefore void as excluding female heirs and thus excluding the legal course of inheritance: and (4) the deed makes no reference to the corpus and leaves it undisposed of, the settlor's intention being not to pass the estate itself but to limit the enjoyment of the rents and profits for an indefinite period; this would not be allowed by Hindu Law.

The learned trial Judge observes: "I think that the gift to the male heirs of Krishnabai is a gift to such of her sons as were in existence at the date of the deed and such as might survive Krishnabai I think it is impossible to escape the conclusion that the settlor did not intend to leave any interest in properties comprised in the deed undisposed of. On the other hand, there is upon the face of the deed sufficient indication of intention on the part of the settlor that the heirs of Krishnabai should take an absolute interest in the one-fourth share assigned."

The question is—What was the intention of the settlor? His intention is to be sought in his words. The deed is written in the English language; the settlor was himself a lawyer; but, it must be confessed, the instrument is not very easy to construe. In the case of Raghunath and of Krishnabai, he uses the words, his and her "male heirs." In the case of Pootlabai's daughter Sonabai the

gift is to her "children." In Anandrao's case it is to his "male children."

Who, then, were intended to take the estate as Krishnabai's male heirs? The parties being Hindus, the donees must be in existence, either in fact or in contemplation of law, at the date of the settlement. In this case there is an uncertainty as to the existence of Krishnabai's male heirs at the material time. It was quite possible that none of her sons who were in existence at the date of the deed might survive Krishnabai and a wholly different person or a totally different set of persons answering to that description, "her male heirs," might come into being after that date. If by Krishnabai's male heirs the settlor meant her sons who were then in existence, he has—it must be allowed—used singularly inapt words to convey that meaning. The settlor, no doubt, was actuated by "the natural love and affection" which he bore "to his children and grandchildren hereafter mentioned," but that circumstance does not justify the substitution of "Krishnabai's sons" for "Krishnabai's male heirs." The words "grandchildren hereafter mentioned" have their application; for the gifts to Sonabai and Anandrao were gifts to the settlor's "grandchildren." The learned Judge observes that "there is upon the face of the deed sufficient indication of intention on the part of the settlor that the heirs of Krishnabai should take an absolute interest in the one-fourth share assigned to Krishnabai." He, therefore, holds "that the surviving sons of Krishnabai and the heirs of her deceased sons are entitled as between them to the one-fourth share assigned to Krishnabai absolutely." The settlor, however, speaks not of heirs, but of her male heirs, and thereby shows an intention to confine the inheritance to males, to the entire exclusion of female heirs; and the disposition is void as "excluding the legal course of inheritance." *Kumar Tarakeshwar Roy v. Kumar Shoshi Shikhareswar* (1).

Reading the deed as a whole, it seems to me, that the disposition is also void on the other contention raised by the appellants, namely, that the object of the settlor was to create a perpetuity as regards these properties. The estate itself is not disposed of. The trustees are empowered to sell the properties "except the family

house in Breach Candy Road," to invest the monies arising from such sale in securities in the manner directed. "And it is hereby declared that the annual income arising from such securities shall from time to time go and be payable to the person or persons who under the trusts aforesaid would have been entitled to the annual rents and profits arising from the land, premises and shares before referred to in case the same had remained unsold." The house at Breach Candy Road is to supply a residence to the different members of the family, and in some cases to their "heirs," but its ultimate destination is not to be found in the deed, although the settlor goes into such minute details as the following: "All glass and wooden furniture in the hall and the glass moons and globes in the said dwelling house at Breach Candy Road shall be used by all the occupants of the house jointly and in case of anything being broken shall be replaced by the person causing the damage." In my opinion, the object of the settlor was to create a perpetuity as regards the whole of the trust estate and to limit for an indefinite period the enjoyment of the rents and profits of the estate.

I arrive at the same conclusion with regard to the trusts in favour of Raghunath's "male heirs."

The result is that the trusts after the deaths of Raghunath and Krishnabai are invalid.

As regards the house on Breach Candy Road there is a separate trust. The right to live in specified portions of it is given to various persons. The provisions in that behalf which need to be considered, are those in favour of: (1) Raghunath and his "heirs"; (2) Pootlabai and her children; (3) Anandrao and his "children"; and (4) Krishnabai and "after her death her male heirs." Anandrao's branch need no longer be considered. As to the rest the opinion of the learned trial Judge is this: "The male heirs of Krishnabai and the heirs of Raghunath and Sonabai are entitled to residence in the portions . . . set apart for them respectively, Sonabai's right of residence being only for her life The question as to whether there is a resulting trust in favour of the heirs of the settlor after Sonabai's death in respect of the portions now occupied by her to be considered after the death of Sonabai." Krishnabai died in 1897, and Raghunath in 1908.

(1) [1883] 9 Cal. 952=10 I. A. 51=13 O.L.R. 62=4 Sar. 430 (P. O.)

There being no disposition of the house, their right of residence was, in my opinion, only a personal right. Whether so long as they were alive they were entitled to live there accompanied by their own children, is a question which it is no longer necessary to consider; probably they were. But on their death, the portions which were respectively assigned to them for residence reverted to the settlor's heirs. On a proper construction of the deed I agree with the trial Judge that Sonabai, the daughter of Pootlabai, is entitled to reside in that portion of the buildings which is expressly allotted to Pootlabai and her children. But the right is personal: and on Sonabai's death that portion of the property will revert to the heirs of the settlor.

The appellants to be held entitled to possession of the family house subject to the right of residence of Sonabai. The trust will have to continue until Sonabai's death. Appellants are entitled to three-fourths absolutely and to the remaining one-fourth on Sonabai's death.

All costs out of the fund. Trustees' costs to be taxed as between attorney and client. Two counsel certified.

Appeal allowed.

1925 BOMBAY 476

MACLEOD, C. J., AND COYAJEE, J.

Bai Samju and others—Appellants.

v.

Lallubhai Talsibhai—Respondent.

First Appeal No. 164 of 1924, Decided on 31st March 1925, from the decision of the Sub. J., Nadiad, in Dharkhast No. 91 of 1923.

Bhagdari and Narvadari Act (Bombay Act V of 1862), S. 1—Separation of a portion of narva land by proprietor—Recognition of the portion by Collector as separated sub-division—Such portion must be considered as a recognised sub-division.

Where the proprietor of a recognised sub-division of a Narva separated from that land a portion for the purposes of building, and where the Collector recognised the separation of that portion for building purposes.

Held: that such separation in no way derogated from the constitution of the narva homestead, and that the separated portion must be considered as a recognised sub-division.

[P. 477 C. 1]

H. V. Divatia—for Appellants.

M. H. Mehta—for Respondent.

Macleod, C. J.—The trial Judge has held that the property sought to be attached is a recognised sub-division of a Narva and is therefore liable to the process of the Court under the provisions of Bombay Act V of 1862. On the evidence produced before the Judge, it appeared that the judgment-debtor Manibhai, now represented by the appellants, originally was the proprietor of a recognised sub-division of a Narva measuring 1 anna 1 pie. Twelve years ago eight gunthas were separated from that land for the purpose of building a bungalow. These eight gunthas were separately assessed, and Manibhai sold the site with the bungalow without any objection being raised thereto by the revenue authority. In fact, we may take it that the revenue authority recognised that site as being separately assessed and capable of being transferred by itself. The judgment-debtor, however, contends that it still remains a part of the Narva, so that the land still remaining to him after the separation of eight gunthas can no longer be considered a recognised sub-division of Narva village. The Judge rejected this contention and directed the sale proclamation to be issued.

In appeal it has been urged that the separation of eight gunthas, even though they were separately assessed, cannot prevent the original holding of the tenant being still considered as the recognised sub-division. What is a recognised sub-division of a narva is not defined in the Bhagdari and Narvadari Act V of 1862. The object of the Act was to prevent anything else than a recognised sub-division of a bhag or share in a bhagdari or narvadari village being attached or sold by a process of a Court. Now we have the Manual published under the orders of Government to enable the revenue officers to understand what should be done with regard to these Narvas, and under Government Resolution No. 7241 of July 26, 1909, it was directed as follows:

"S. 1 of Act V of 1862 was inserted only in order to preserve the narva homestead and was not directed towards buildings erected for unconnected purposes. The Collector is at liberty to recognise any sub-division he thinks fit. The fact that land required for building purposes forms part of a narvadari holding does not act as a bar to its acquisition by a non-narvadar. A sharer in a nar-

vadari village may, with the Collector's permission, relinquish any portion of his share and allow it to cease to be narva land. When a plot of narvadari land is acquired by a non-narvadar for building purposes the liability for the enhanced assessment should be thrown on the purchaser by the formal resignation of the land by all the-narvadars concerned."

Now in this case the Collector has recognised the separation of these eight gunthas for building purposes, and we may take it that such separation in no way derogated from the constitution of the narva homestead, and that, as the Collector was in the circumstances of this case, at liberty to recognise any sub-division, these eight gunthas must be considered as having been recognised as a sub-division so that the balance of the judgment debtor's share in the narva would necessarily also constitute a recognised sub-division. Otherwise, if the contention of the judgment-debtor were to succeed, it would follow that if a sharer in a bhagdari village with the permission of the Collector separated a small portion of land for building purposes unconnected with the preservation of the homestead, and sold that portion, then the rest of the share would, under no circumstances, be a recognised sub-division and would not be liable to the process of a civil Court. We do not think that was intended by Act V of 1862. The appeal is dismissed with costs.

Appeal dismissed.

1925 BOMBAY 477

MACLEOD C. J., AND COYAJEE, J.

Ulawappa Basawanappa Hugar and others—Appellants.

v.

Gadigewa Hugar and others—Respondents.

Second Appeal No. 159 of 1924, Decided on 25th March 1925, from the decision of the D. J., Dharwar, in Appeal No. 171 of 1922.

Bombay Land Revenue Code (Bombay Act 5 of 1879), S. 133—Sanad is a document of title—Entries in Collector's books are not much evidence

of title—Sanad holder need not prove possession within 12 years of suit.

An entry in the Collector's books that a certain person is the occupant and liable to pay revenue, does not afford much evidence of title. But when a sanad is given under S. 133, after due inquiry, in the form in Schedule H, the sanad itself is a document of title.

There is a presumption in favour of the sanad holders that they were in possession, considering the nature of the land under the title given to them by the sanad, and it would lie upon anybody disputing their title to show that he had acquired a title by adverse possession. It is not incumbent upon the sanad holders once they prove the sanad, to show that they were in possession within twelve years of the date of their suit. [P. 477 C. 2, P. 478 C. 1]

A. G. Desai—for Appellants.

B. A. Jakagirdar—for Respondents.

Macleod, C. J.—The plaintiffs sued to recover possession of the site described in the plaint. The defendants replied that the site did not belong to plaintiffs; that it belonged to the defendants; that the plaintiffs were never in possession; and that as they were not in possession within twelve years next before suit, the suit was time-barred.

The trial Court held that the suit site belonged to the plaintiffs; that it was in their possession within twelve years next before suit, and that the suit was not barred by limitation.

In appeal the District Judge referred to the sanad issued to the plaintiffs in 1902 under S. 133 of the Bombay Land Revenue Code. The Judge said:—

"The sanad means that the plaintiffs' father was at the time registered in the Collector's books as the occupant of No. 274. The Collector's books are kept for the purposes of revenue. They indicate the person who is or would be liable for the payment of land assessment. They do not indicate any title as between a subject and a subject. They do not even afford a certain index of actual possession. It is clear that in the present case the plaintiffs' father, although he was the registered occupant of No. 274, was nevertheless not in actual possession of the whole of that number."

Now it is quite true that an entry in the Collector's books that a certain person is the occupant and liable to pay revenue, does not afford much evidence of title. But when a sanad is given

under S. 133, after due inquiry, in the form in Schedule H, the sanad itself is a document of title. It contains these words "your are hereby confirmed in the said occupancy exempt from all land revenue, (or subject to the payment of Rs. per annum to land revenue). The terms of your tenure are such that your occupancy is both transferable and heritable, and will be continued by the British Government."

On the survey number was a house belonging to the plaintiffs and also a similar house which apparently has been in the possession of the defendants and their predecessors. With regard to the portion of the survey number covered by that house, the defendants will have acquired a title by adverse possession. But with regard to the remainder of the survey number, we think the Court would be justified in holding that they were in possession, considering the nature of the land, under the title given to them by the sanad, and it would lie upon anybody disputing the plaintiffs' title to show that they had acquired a title by adverse possession. The defendants, therefore, were bound, if they wished to dispute the plaintiffs' claim, to prove that they had been in adverse possession of the suit land for more than twelve years before the date of the suit. We do not see that they have proved anything of the sort. No doubt they were in possession of certain portions of the land which they were cultivating, but to what extent and for how long, they have not led any evidence. We do not think then it was incumbent upon the plaintiffs, once they proved the sanad, to show that they were in possession within twelve years of the date of the suit. We cannot agree, therefore, with the District Judge when he says that the plaintiffs have not proved their title to the plot in suit, and title having been proved, it seems to us that possession can be presumed. Otherwise any trespasser might enter upon the land, and when the plaintiffs sought to eject him, he might answer that the plaintiffs would have to show that they were in possession within twelve years of the suit. That, considering the nature of the land, although adjacent to the plaintiffs' house, might be an extremely difficult matter for the plaintiffs to prove, and considering the circumstances of

the case, we think they ought not to be called upon to prove it against a trespasser.

We think, then, the decision of the District Judge cannot be supported; the appeal must be allowed and the decree of the trial Court restored with costs throughout.

Appeal allowed.

1925 BOMBAY 478

MACLEOD, C. J. AND COYAJEE, J.

Emperor

v.

Sahebava Birappa—Accused.

Criminal Ref. 10 of 1925, Decided on 3rd April, 1925, (Ref. Made by the Dt. Mag. Bijapur.)

Penal Code S. 372—Tying Talimani to minor girl, worshipping basin of water, distributing food are preliminary step to selling for prostitution and not an offence under the section.

The ceremony which consists of tying a talimani to a minor girl, worshipping a basin of water and distributing food may be a preliminary step before selling, letting out or disposing of the girl for the purpose of prostitution, but that does not make it an offence under the Indian Penal Code. [P. 479 C. 1]

S. S. Patkar—for the Crown

G. R. Madbhavi—for the Accused.

Macleod, C. J.—The accused was charged before the First Class Magistrate of Muddebihal with letting off for prostitution a minor girl. It appears that a certain ceremony was performed a year and a half ago, which consisted of tying talimani, worshipping a basin of water, and distributing food. The Magistrate convicted this accused, but as she was a woman and her character in other ways was not in any way questioned, he proceeded under S. 562, Criminal Procedure Code, and ordered her to be let off on probation of good conduct for one year with one surety for Rs. 200 and a personal recognisance for a like amount. The District Magistrate of Bijapur refers the case to this Court and asks this Court to revise the First Class Magistrate's order and impose a sentence of imprisonment on the accused. If the accused had been found guilty of an offence under S. 372, Indian Penal Code no doubt a sentence of imprisonment would have been called for. But the performance of this ceremony does not

come within the provisions of S. 372. It has not been proved that the accused sold the minor, or let out the minor, to hire or otherwise disposed of her, with the intent that she should be used for the purpose of prostitution. The ceremony itself may be a preliminary step before the selling, for the letting out or disposing of the girl for the purpose of prostitution, but that does not make it an offence under the Indian Penal Code. We, therefore, direct that the conviction be set aside and the bond of the surety released.

Conviction set aside.

1925 BOMBAY 479

MACLEOD, C. J. AND COYAJEE, J.

Emperor—Complainant.

v.

Ranchhod Harjivan—Accused.

Criminal Ref. No. 4 of 1925, Decided on 3rd April, 1925, made by the Dt. Mag., Thana.

Criminal P. C., S. 562 (1 A)—Proviso to the section applies to whole section including sub-section (1 A) newly added—So third class Magistrate cannot exercise powers under sub-S.(1 A.)

Ordinarily when a proviso governs the whole of the provisions of a section, it ought to appear at the end; but the proviso to S. 562 is applicable to the whole of S. 562 including the newly added sub-s. (1 A), so that a Third Class Magistrate is not competent to exercise powers to release the offender after due admonition under S. 562 (1 A), though the proviso appears in the middle of S. 562. [P. 479 C.]

S. D. Sapre for D. V. Dharap—for Accused.

M. T. Telivala—for Complainant.

Macleod, C. J.—The accused was charged before the Third Class Magistrate of Umbergaon with having committed an offence under ss. 352 and 504, Indian Penal Code. He was found guilty; but instead of sentencing him to punishment, the Magistrate discharged him after giving admonition under sub-S. (1 A) of S. 562 of the Criminal Procedure Code, on account of his tender age. The District Magistrate has referred the case to this Court on the ground that the proviso to S. 562 is applicable to the whole of S. 562, including the newly added sub s. (1 A), so that the

Third Class Magistrate was not competent to exercise powers under S. 562 (1 A). It is unfortunate that when sub-S. (1 A) was added to S. 562, the legislature did not place it before the proviso. Ordinarily speaking, when a proviso governs the whole of the provisions of a section, it ought to appear at the end. This proviso says that where any first offender is convicted by any Magistrate of the Third Class, or a Magistrate of the Second Class not specially empowered by the Local Government in this behalf, and the Magistrate is of opinion that the power conferred by this section should be exercised, he shall record his opinion to that effect, and submit the proceedings to a Magistrate of the First Class or Sub-Divisional Magistrate, forwarding the accused to, or taking bail for his appearance before such Magistrate, who shall dispose of the case in manner provided by S. 380. Before sub-S. (1 A) was added, the only power conferred on the Court by the section was to direct that the accused, if a first offender, in cases coming within the section, should be released on his entering into a bond, with or without sureties to appear and receive sentence when called upon during such period (not exceeding three years) as the Court may direct, and in the meantime to keep the peace and be of good behaviour.

A further power is added by sub-S. (1 A) to release the accused in cases coming within the sub-section after due admonition, if he is a first offender. That undoubtedly is a power under the section, and although the proviso comes now in the middle of the section, that fact does not affect the competency of the Third Class Magistrate to exercise the power granted to the Court under sub-S. (1 A).

We think then in this case the District Magistrate was right, and the Third Class Magistrate should have remitted the proceedings to the Magistrate of the First Class or Sub-Divisional Magistrate. It is competent to this Court now on this reference to review the Third Class Magistrate's order. Considering the circumstances of the case, the position of the accused, and his unwarranted conduct towards the complainant, we do not think that he should be let off without any punishment at all. Although as the Magistrate remarks, he

may be of tender age, buoyant nature, and impulsive character, still he does occupy a certain position in society, and it is certainly incumbent on such persons to see that they behave properly towards those whom they employ to do work for them. We think the accused should pay a fine of Rs. 30; in default to undergo fourteen days' simple imprisonment.

Reference answered in affirmative.

1925 BOMBAY 480

MACLEOD, C. J., AND COYAJEE, J.

Nagindas Dahyabhai—Petitioner

v.

Gordhandas Dahyabhai—Respondent.

Civil Extraordinary Application No. 221 of 1924, Decided on 25th March 1925, against the decision of the Dt. J., Surat, in Mis. App. No. 1 of 1924.

Provincial Insolvency Act (V of 1920), S. 53—A person is adjudged insolvent on the date on which the order is made, though effect of such order relates back to earlier date—Voluntary transfer by a person is voidable only if made within two years from the date of the adjudication order.

A person is adjudged insolvent on the day on which the order is made, though the effect of the order on the insolvent's property relates back to an earlier date. A voluntary transfer by a person is voidable only if made within two years from the date on which the adjudication order is made. [P. 482 C 2]

G. N. Thakor and M. B. Dave—for Petitioner.

B. D. Mehta—for Respondent.

Macloed, C. J.—This is an application under S. 75 of the Provincial Insolvency Act V of 1920. One Thakor Girdhar had filed a petition to be adjudicated insolvent on July 17, 1922. The order of adjudication was made on November 11, 1922. An application was made to the Subordinate Judge on which notice was issued to Nagindas Dayabhai to show cause why the transfer dated November 2, 1920, by the insolvent in his favour should not be annulled under S. 53 of the Provincial Insolvency Act V of 1920. The following issues were raised :

1. Whether the transfer to the opponent dated November 2, 1920, is or is not in good faith and for valuable consideration ?

2. Whether the application is barred by limitation ?

3. Whether the present applicant can apply under S. 53 of the Insolvency Act ?

The Judge found that the transfer was not in good faith or for valuable consideration; that the application was not barred by limitation; and that the present applicant could apply under S. 53 of the Act.

That section runs as follows :

"Any transfer of property not being a transfer made before and in consideration of marriage or made in favour of a purchaser or incumbrancer in good faith and for valuable consideration shall, if the transferor is adjudged insolvent within two years after the date of the transfer, be voidable as against the receiver and may be annulled by the Court."

The transfer was made more than two years before the date of the adjudication order, but the Judge considered that the adjudication order related back to the date of the presentation of the petition under S. 28 (7) of Act V of 1920, and therefore, held that the period of two years mentioned in S. 53 should be the two years before the presentation of the insolvency petition. An order was made accordingly that the transfer dated November 2, 1920, was annulled and the receiver should take possession of the house in dispute.

An appeal was filed in the District Court. The District Judge said :

"There is a conflict of authority on the question whether, in order to attract the applicability of the section the transfer must have been made within two years preceding the date of the adjudication or whether it is sufficient if it was made within two years preceding the date of the presentation of the insolvency petition. The weight of authority and the better opinion, however, appears to be in favour of the view that the effect of S. 28 (7) of the Act on the interpretation of the words 'if the transferor is adjudged insolvent within two years after the date of the transfer' in S. 53 is to put back that point of time to the date of the presentation of the insolvency petition."

The question was decided in that way in *Rakhal Chandra v. Sudhindra Nath Bose* (1). Their lordships said :

"It is contended on behalf of the appellant that the transfer in the present case having been made more than two years before the date of the adjudication order, is not void against the Receiver.

S. 16 (6) of the Provincial Insolvency Act [the proceedings were under Act III of 1907], however, lays down that an order of adjudication shall relate back to and take effect from the date of the presentation of the petition on which it is made.

It is contended that S. 16 (6) of the Act does not affect any transfer made two years before the order of adjudication, but that the relation back has reference to other matters.

We are of opinion, however, that an order of adjudication relates back to, and takes effect from, the date of the presentation of the petition for the purpose of making the properties of the insolvent liable to the claims of the creditors. Under the English Law, an order of adjudication relates back to, and takes effect from, the date of an act of insolvency; but under the law [S. 16 (6) of the Provincial Insolvency Act], an order of adjudication operates only from the day when the petition of insolvency is presented to the Court. It follows that from that time the property of the debtor is made available for payment of the debts. If the contention of the appellant were accepted, the provisions of the Act might be defeated in some cases. After the petition for insolvency is made, the order of adjudication may be delayed in some cases for more than two years, for instance where the matter goes up to the Privy Council on appeal, and in such a case any transfer made by the insolvent within two years before the date of presentation of the petition of insolvency, but more than two years before the order of adjudication would become valid. We do not think that such a result was contemplated, and we are of opinion that the provisions of S. 36 are to be read with S. 16 (6) of the Act."

S. 28 (7) of Act V of 1920 corresponds to S. 16 (6) of Act III of 1907. It would not be quite correct to say that

under the English Law the order of adjudication relates back to the date of the presentation of the petition on which it was made. That is not the scheme of the English Act on which the doctrine of "relation back" in the Provincial Insolvency Act is based.

Under S. 37 of the English Bankruptcy Act of 1914, "the bankruptcy of a debtor, whether it takes place on the debtor's own petition, or upon that of a creditor or creditors, shall be deemed to have relation back to, and to commence at, the time of the act of bankruptcy being committed on which a receiving order is made against him." So that, although the adjudication order can only be dated as of the day on which it is made, the commencement of the bankruptcy is determined by the date of the act of bankruptcy. Under S. 42 of the English Act :

"Any settlement of property, not being a settlement made before and in consideration of marriage, or made in favour of a purchaser or incumbrancer in good faith and for valuable consideration, or a settlement made on or for the wife or children of the settlor of property which has accrued to the settlor after marriage in right of his wife, shall, if the settlor becomes bankrupt within two years after the date of the settlement, be void against the trustee in the bankruptcy."

The words "becomes bankrupt" also appeared in S. 47 of the English Bankruptcy Act of 1883, and in *Ex parte Clough* (2) were construed as meaning "commits an available act of bankruptcy." The bankrupt committed an act of bankruptcy on May 26, 1903, and was adjudicated in July. On June 10 he transferred a house and furniture to his settlement trustees. It was held that he must be deemed to have become bankrupt on May 26, and that the house and furniture not having been actually transferred before that date the deed was void against the trustee in bankruptcy, so far as necessary to pay his debts in bankruptcy, under S. 47 of the Bankruptcy Act of 1883, which enacted that any covenant made in consideration of marriage for the future settlement of a property on or for the settlor's wife and children wherein he had not at the date of the marriage any estate or interest

(1) [1919] 46 Cal. 991.=52 L. O. 747=24 C. W. N. 172.

(2) [1904] 1 K. B. 451.

shall on his 'becoming bankrupt' before the property has been actually transferred be void against the trustee in bankruptcy. Wright, J., said (p. 455):

"What is the meaning of 'becoming bankrupt'? There is, apparently, no authority to guide me. Strong reasons are urged for the view that the words 'commencement of the bankruptcy' would have been used if that had been intended. On the other hand, it is said that, if the date of adjudication had been intended, the use of the words 'adjudicated bankrupt' would have been more natural than 'becoming bankrupt.' It seems to me that I must construe 'becoming bankrupt' in S. 47 by the light of S. 43, which says . . . 'the bankruptcy of a debtor shall be deemed to commence at the time of the first of the acts of bankruptcy proved to have been committed within three months next preceding the date of the presentation of the bankruptcy petition.' Now, if that is so, the bankruptcy here must be deemed to have commenced as from May 26, and I think that the bankrupt must be deemed to have become bankrupt on that date."

I doubt very much whether the decision would have been the same if the words 'is adjudicated bankrupt' had been used in the section instead of 'becomes bankrupt.'

So also under S. 51 of the Presidency Towns Insolvency Act:

"The insolvency of a debtor, whether the same takes place on the debtor's own petition or upon that of a creditor or creditors, shall be deemed to have relation back to and to commence at (a) the time of the commission of the act of insolvency on which an order of adjudication is made against him."

Then under S. 55 of the same Act:

"Any transfer of property, not being a transfer made before and in consideration of marriage, or made in favour of a purchaser or incumbrancer in good faith and for valuable consideration, shall, if the transferor is adjudged insolvent within two years after the date of the transfer, be void against the official assignee."

That section is practically in the same words as S. 36 of Act III of 1907.

Section 56 of the same Act deals with fraudulent preferences, and under that section:

"Every transfer of property, etc., in favour of any creditor with a view of

giving that creditor a preference over the other creditors, shall, if such person is adjudged insolvent on a petition presented within three months after the date thereof, be deemed fraudulent and void as against the Official Assignee."

In the same way by S. 54 of the Provincial Insolvency Act V of 1920:

"Every transfer of property, etc., in favour of any creditor with a view of giving that creditor a preference over the other creditors, shall, if such person is adjudged insolvent on a petition presented within three months after the date thereof, be deemed fraudulent and void as against the receiver, and shall be annulled by the Court."

It cannot be denied that a person is adjudged insolvent on the day on which the order is made, though the effect of the order on the insolvent's property relates back to an earlier date.

Therefore, in our opinion, if it had been intended that a voluntary transfer should be voidable if made within two years from the date of the presentation of the petition on which the adjudication order is made, there was no reason why that should not have been as clearly stated in S. 53 as it is in S. 54, and we do not think that the doctrine of "relation back" can be imported into the former section, so as to make it appear that the point of time from which the two years are to be calculated is the date of the presentation of the petition, and not the date when the transferor is adjudged insolvent. The mere probability that in some cases a voluntary transfer cannot be defeated on account of the delay in making the adjudication order, after the presentation of the petition, cannot provide sufficient ground for interpreting the words in S. 53 otherwise than according to their clear meaning.

We think, therefore, that the decision of the Court below was wrong, and that the rule must be made absolute with costs throughout.

Rule made absolute.

1925 BOMBAY 483

MACLEOD, C. J. AND COYAJEE, J.

Vishnu Shankar Joshi and others—
Appellants.

v.

Yusuff Nurmahamad—Respondent.

Second Appeal No. 232 of 1924, Decided on 9th April 1925, from the decision of the Assistant Judge of Thana, in Appeal No. 134 of 1922.

Civil P. C., Ss. 65 and 63—Property sold in execution of two decrees—Purchaser at the unconfirmed sale gets no title to property.

Certain property was attached in execution of a decree and was sold on 28th February 1917. The same property was attached and sold by another Court in execution of another decree on 3rd March 1917 and was purchased by the plaintiff. The first sale was never confirmed. The judgment-debtor applied to set it aside under O. 21, R. 89, and ultimately it was decided by compromise that if the judgment-debtor deposited a certain amount by a certain time the sale should be set aside. The deposit was accordingly made by the judgment-debtor on 11th September 1920, and the sale was set aside and the proceedings in the first executing Court thus terminated. The sale of the second Court was duly confirmed. The judgment-debtor had obtained from defendants the necessary money to set aside the sale by the first Court. In consideration thereof he sold the property to them on 21st September 1920 with certain other properties, and put the purchaser in possession thereof. The plaintiff then brought a suit to recover possession.

Held, that when the first executing Court sold the property the purchaser merely obtained a right to get the sale confirmed, and it would not be until he obtained the sale certificate, that the vesting of the property would date back to the date of the sale. When the second executing Court sold the same property, the purchaser also obtained an inchoate right which would fail to materialize if the previous sale was confirmed. When the previous sale was set aside then the right of the purchaser from the second executing Court which had been in the meanwhile in suspense, revived, and if the sale was confirmed, then his title would date back to the date of the sale. There was nothing to prevent the judgment-debtor objecting to the second sale before the certificate was issued. Therefore the plaintiff was entitled to succeed.

[P. 484, C. 1.]

*P. S. Bakhale—for Appellants.**Y. V. Bhandarkar—for Respondent.*

Macleod, C. J.—One Merwanji had several money decrees standing against him. In execution of one of them, the Thana First Class Court attached a certain land belonging to him on 25th May 1916. About the same time in execution of another decree the Panvel

Second Class Court also attached the same property. The fact that the Thana Court had attached the property had not been brought to the notice of the Panvel Court.

Under S. 63 of the Civil Procedure Code, where property not in the custody of any Court is under attachment in execution of decrees of more Courts than one, the Court which shall receive or realize such property, and shall determine any claim thereto, and any objection to the attachment thereof, shall be the Court of highest grade. Sub-sec. (2) says that nothing in this section shall be deemed to invalidate any proceeding by a Court executing one of such decrees.

The Thana Court sold the property on 28th February 1917, and the Panvel Court sold the same property on 3rd March 1917. Under S. 65 of the Code "where immovable property is sold in execution of a decree and such sale has become absolute, the property shall be deemed to have vested in the purchaser from the time when the property is sold and not from the time when the sale becomes absolute." But until the sale becomes absolute, the property cannot be said to be vested in the purchaser, who has only an inchoate right, which becomes permanent when the sale is made absolute. The sale by the Thana Court was never confirmed. The judgment-debtor applied to set it aside under O. 21, R. 89, and ultimately it was decided by compromise that if the judgment-debtor deposited a certain amount by a certain time the sale should be set aside. The deposit was accordingly made by the judgment-debtor on 11th September 1920, and the sale was set aside, and the proceedings in the Thana Court thus terminated. The sale of the Panvel Court was duly confirmed and the present plaintiff is the purchaser. The judgment-debtor had obtained from defendants Nos. 2 to 4 the necessary money to set aside the sale by the Thana Court. In consideration thereof he sold the property to them on 21st September 1920, with certain other properties, and put the purchaser in possession thereof.

The plaintiff had then to bring this suit to recover possession. The Subordinate Judge decreed the plaintiff's claim, and that decree was confirmed in appeal by the Assistant Judge.

It was argued before the Assistant Judge, and the argument has been repeated in this Court, that when the Thana Court sold the property on 28th February 1917, the judgment-debtor's interest in the land ceased, and further that the attachment proceedings in the Panvel Court also came to an end, as there was no property on which it could take effect, or which could be conveyed to the purchaser. The Judge said :—

"The fallacy of this argument lies, as pointed out by the trial Judge, in assuming that the title of the judgment-debtor is transferred to the Court purchaser immediately on the acceptance of his bid. But that is not the law."

It seems to me that when the Thana Court sold the property, the purchaser merely obtained a right to get the sale confirmed, and it would not be until he obtained the sale certificate, that the vesting of the property would date back to the date of the sale. When the Panvel Court sold the same property, the purchaser also obtained an inchoate right which would fail to materialize if the previous sale in the Thana Court was confirmed. When the Thana sale was set aside then the right of the purchaser from the Panvel Court, which had been in the meanwhile in suspense, revived, and if the sale was confirmed, then his title would date back to the date of the sale. There was nothing to prevent the judgment-debtor objecting to the sale in the Panvel Court before the certificate was issued. He did not do this. So we think the plaintiff is entitled to succeed.

We dismiss the appeal with costs.

Coyajee, J.—I agree.

Appeal dismissed.

★ 1925 BOMBAY 484

MACLEOD, C. J. AND COYAJEE, J.

Gafur Imam—Defendant—Appellant.

v

Amir Isab Saudagar and others—Plaintiffs—Respondents.

Second Appeal No. 817 of 1923, Decided on 5th February 1925, from the decision of the 1st Class Sub. J., at Nasik, in Appeal No. 104 of 1922..

★ *T.P. Act S. 95*,—Charge on the property for expenses incurred in redemption by one co-mortgagor—Interest on the expenses are not allowable without notice to co-mortgagors about interest.

Under S. 95, the redeeming co-mortgagor is only given a charge for his portion of the expenses properly incurred in so redeeming and

obtaining possession of the mortgaged property. Consequently his claim to interest on the expenses so incurred must arise, if at all, not from the section, but from some other ground, for instance, if he gave notice to the co-mortgagors. [P 485 C 2]

S. Y. Abhyankar—for Appellant.

S. R. Gokhale—for Respondents.

Macleod, C. J.—The plaintiffs sued to obtain possession by partition of their one-third share in the suit property, and for recovering contribution from the defendants for money paid by the plaintiffs for redeeming the other two-thirds in the same.

The trial Judge held that the plaintiffs could claim one-third share in the suit property; that they had redeemed the mortgages on the property and obtained possession; and that the plaintiffs were entitled to a sum of Rs. 66-10-8 from the defendants as their contribution towards the expenses incurred in redeeming the property. He did not allow the plaintiffs any interest on that amount.

The third defendant alleged that he had repaired the house at a cost of Rs. 350 after he had purchased the interest of the first defendant, one of the original mortgagors. The Judge found that he had spent Rs. 350, and held that the plaintiffs were liable to pay one-third of that amount.

In appeal the appellate Judge held that plaintiffs were entitled to interest on the amounts which they had spent in paying off the mortgagee, and considered twelve per cent. as a reasonable rate, but he differed from the Court below with regard to the money spent by the third defendant in making repairs, and found he could not be considered a *bona fide* purchaser, and consequently passed a decree for the plaintiffs that their one-third share should be equitably separated and given in their possession and the third defendant should pay to the plaintiff No. 1, Rs. 154 as his share of the mortgage money with interest at six per cent, thereon from the date of suit till payment within two months from the date of the decree.

The third defendant has appealed. He contends that he ought to have been allowed proportionate costs of repairs made by him to the house situated in the suit land, and that the Judge erred in law in awarding interest to the plaintiff on the amounts spent by him in redeeming the property. We do not think that

the third defendant in the circumstances of the case is entitled to charge the plaintiff with his proportion of the cost incurred by him in executing repairs to the property.

On the question whether he is liable to pay interest to the plaintiffs on his proportion of the expenses properly incurred in redeeming the property, there is no direct authority. S. 95 of the Transfer of Property Act says:—

"Where one of several mortgagors redeems the mortgaged property and obtains possession thereof, he has a charge on the share of each of the other co-mortgagors in the property for his proportion of the expenses properly incurred in so redeeming and obtaining possession."

In a note in Mitra's work on the Transfer of Property Act (2nd Edn.) to S. 95 we find the following passage at page 511.

"The redeeming co-mortgagor has a right to claim interest on the money paid by him. The rate of interest must be reasonable. The fact that he had to borrow redemption money at a high rate of interest is not a ground for charging the same rate from the other co-mortgagors." The authority for that proposition is *Jago v. Arjun* (1). In *Raushan Ali Khan v. Kali Mohan Moitra* (2), the Court allowed interest at twelve per cent. We have been referred, however, to the case of *Malik Ahmad Wali Khan v. Mt. Shamsi Jahan Begam* (3). The principal question argued was whether the redeeming co-mortgagor could claim contribution from his co-mortgagors if he had not obtained possession of the mortgaged property. The Privy Council held that the section should be construed distributively, and that the charge followed on redemption; the condition of obtaining possession applied only to cases in which its fulfilment was from the nature of the mortgage possible. The plaintiff claimed during the argument that he was entitled to recover two-thirds of the amount paid by him, with interest at the stipulated rate, and to have a charge declared in his favour on the respondents' interests in the mortgaged property. The judgment of their Lordships does not deal with this contention. But the decree

passed by them declared that the plaintiff was entitled to recover against the defendants two-thirds of the sum paid by him to redeem the mortgage, with interest at six per cent. per annum from the date of the institution of the suit. We must take it, therefore, that the claim for interest from the date of redemption was disallowed. It seems to us reading S. 95, that the redeeming co-mortgagor is only given a charge for his portion of the expenses properly incurred in so redeeming and obtaining possession of the mortgaged property. Consequently his claim to interest on the expenses so incurred must arise, if at all, not from the section, but from some other ground. If, for instance, he gave notice to the co-mortgagors that he had redeemed the property, and that he had a statutory charge for his proportion of the expenses so incurred, he might also give them notice that he would claim interest against them on that amount if they wished to redeem their shares. But if no such notice is given, it is difficult to see on what the claim for interest could be founded, or from what authority the Court could derive the power to exercise a discretion to allow interest.

We think, therefore, that we must allow the appeal to this extent, that defendant No. 3 must pay the plaintiff Rs. 66-10-8 as his share of the mortgage money with interest at six per cent, thereon from the date of suit till payment. Defendant No. 3 can have three months to pay the amount from the time the proceedings are returned to the trial Court.

No order as to costs of the appeal.

Appeal allowed.

1925 BOMBAY 485

MACLEOD, C. J., CRUMP AND
COYAJEE, JJ.

Secretary of State for India—Appellant.

v.
Bhaskar Krishnaji Samant—Respondent.

Letters Patent Appeal No. 37 of 1924,
Decided on 7th April 1925 from the
decision of Shah, Ag. C. J.

Forest Act (1878), Ss. 75 (d) and 84—Rule under S. 75 (d), prohibiting withdrawal of tenders before acceptance is not ultra vires.

The rule made by Bombay Government under S. 75 (d) of the Forest Act, whereby a person making a written tender to Forest Department for

(1) [1918] 49 I. C. 280.

(2) [1906] 4 C. L. J. 79.

(3) [1906] 28 All. 482=38 I. A. 81=10 C. W. N. 626=3 A. L. J. 360=3 C. L. J. 481=1 M. L. T. 143=8 Bom. L. R. 397=16 M. L. J. 269=8 Sar. 918 (P. O.)

a contract is precluded from withdrawing the tender before acceptance is not *ultra vires*. The rule was made not only to carry out the provisions of the Act, but also in order to amplify the provisions of S. 84. In S. 84 the words "in compliance with any rule made thereunder" are not exactly the right words that should have been used, and it would have been plainer if the legislature had used the words "by virtue of any rule made under the provisions of the Act." [P. 487, C. 2]

Kanga and *S. S. Patkar*—for Appellant.

A. G. Desai—for Respondent.

Macleod, C. J.—On June 25, 1920, the Divisional Forest Officer, Western Division, Thana, by a proclamation, invited tenders with reference to certain forest coupes in the Thana District. The tenders were to be submitted on or before August 5, 1920, 1 P. M. The plaintiff submitted a tender in the standard form for the several coupes, including coupe No. 4 in Block No. 19 before 1 P. M. on August 5. He offered to take up that particular coupe for Rs. 12,299. Immediately after, however, he discovered that he had committed a mistake in that the sum offered was not intended for that particular coupe, but for coupe No. 5, which was near coupe No. 4. He then sought to revoke his tender. At 4-30 on that day the plaintiff's son sent a petition requesting the officer not to sanction the tender for coupe No. 4 as it was submitted under a mistake. The plaintiff and his son also sent a telegram which reached the Divisional Forest Officer at 5-22 P. M. revoking the tender. At 7 P. M. the plaintiff's tender with reference to this coupe was accepted, subject to confirmation by the Conservator of Forests, and such acceptance was notified. The Conservator of Forests, eventually accepted the tender and called upon the plaintiff by notice of October 15, 1920, to pay one-fourth of the amount. The plaintiff refused to accept the acceptance of the tender, and refused to pay. He was then, informed on October 29, that there would be a re-sale of that coupe. In fact it was re-sold on November 18, and it fetched Rs. 2,246. Then the plaintiff was called upon to pay the deficiency, and on December 14, 1920, his wood was attached. It was, however, release from attachment on April 19, 1921.

The plaintiff filed this suit after giving the necessary notice on April 21, 1921. He prayed for a declaration that the

tender of August 5, 1920, did not mature into a contract enforceable by law, the proposal contained in the tender having been revoked before its acceptance, and for an injunction restraining the defendant from enforcing the so-called contract. He also claimed the return of the War-Bond for Rs. 1,000, and he claimed Rs. 500 as damages for illegal and improper attachment of his goods.

The defendant pleaded that the tender was irrevocable and binding as a contract upon the plaintiff in virtue of a rule made by the local Government under S. 75 (d) of the Indian Forest Act, 1878, and that the sum was liable to forfeiture under the provisions of S. 84.

The trial Judge found that the plaintiff could legally withdraw his tender after it was made and before it was accepted, and passed a decree in favour of the plaintiff granting a declaration and injunction as prayed and also directing delivery to the plaintiff of the War-Bond of Rs. 1,000. The rest of the plaintiff's claim was rejected.

The defendant appealed to the High Court. The learned Judges of the High Court differed. Mr. Justice Shah held that the rule on which the defendant relied was *ultra vires*, while Mr. Justice Kincaid held to the contrary. As the opinion of the senior Judge prevailed, under S. 98, Civil Procedure Code, the decision of the Court below was confirmed.

The defendant has now filed this Letters Patent appeal, and the question whether the rule on which the defendant relies is *ultra* or *intra vires* has been fully argued before us.

S. 75 of the Indian Forest Act gives the Local Government power from time to time to make rules *inter alia* under heading "(d), generally, to carry out the provisions of this Act."

S. 77 provides that all rules made by the local Government shall be published in the local official Gazette, and shall thereupon, so far as they are consistent with the Act, have the force of law.

S. 84 is in these terms :

When any person, in accordance with any provision of this Act, or in compliance with any rule made thereunder, binds himself by any bond or instrument to perform any duty or act, or covenants by any bond or instrument that he, or that he and his servants and agents, will

abstain from any act the whole sum mentioned in such bond or instrument as the amount to be paid in case of a breach of the conditions thereof may, notwithstanding anything in S. 74 of the Indian Contract Act, 1872, be recovered from him in case of such breach as if it were an arrear of land-revenue."

That section was added by Act V of 1890, and was amended slightly by Act I of 1918. In 1908 the local Government notified as follows: "in exercise of the power conferred by S. 75 (d) of the Indian Forest Act, 1878, as amended by Act V of 1890, and in supersession of the Government Notification in the Revenue Department No. 2799, dated March 31, 1896, the Governor in Council is pleased to make the following rule with reference to S. 84 of the said Act amended as aforesaid:

"Whoever enters into any contract with any Forest Officer acting on behalf of Government, shall, if so required by such Forest Officer, bind himself by a written instrument to perform such contract."

It is quite clear that that rule was a rule framed for the purpose of carrying out the provisions of the Act. To the rule was added an explanation as follows:

"*Explanation*:—A person who makes a written tender for a contract or who signs the conditions of an auction sale at which he is a bidder, such tender or conditions of sale being on or in a form furnished by a Forest Officer for that purpose, whereby he

(a) binds himself to perform the contract for which he tenders or bids, in the event of his tender or bid being accepted, or

(b) binds himself not to withdraw his tender or bid during the time that may elapse before its acceptance or refusal is communicated to him shall be deemed to have been required by such Forest Officer to bind himself as aforesaid, and in case (a) on the acceptance of his tender or bid, or in case (b), on the making of his tender or bid, to have bound himself accordingly, within the meaning of this rule; and any such person need not enter into a separate written instrument for the purpose unless specially so required by the Forest Officer with whom he contracts."

The tender which the plaintiff signed contained these words:

"I further agree that I will not withdraw this tender during the time that will be required for intimation of the acceptance or non-acceptance of the tender being given to me, and if I do so withdraw (the tender) then I am liable to pay the whole sum of this tender or such amount on account of deficiency as in the opinion of the Conservator or the Deputy Conservator of the Circle may be considered necessary to make good the whole of the loss and damages that may be suffered by Government in consequence thereof and I shall pay the same.

It is admitted on both sides that that agreement under S. 20 of the Indian Contract Act is an agreement without consideration, and therefore, was void. Further that under S. 5 of the Indian Contract Act, a person who makes a proposal is entitled to withdraw it before it is accepted.

Now, according to the explanation to the rule which I have just read, when the plaintiff signed the tender, he must be deemed to have been required by the Forest Officer to bind himself to perform the contract, and further to have bound himself not to withdraw his tender or bid during the time that might elapse before its acceptance or refusal was communicated to him.

Then turning to S. 84 of the Indian Forest Act, the plaintiff in compliance with that rule had bound himself by an instrument to perform a duty or act, or covenanted by such instrument to abstain from a certain act, and the penalty for failure to observe that covenant would be the penalty mentioned in S. 84. I may point out here that the words "in compliance with any rule made thereunder" were not exactly the right words that should have been used, and it would have been plainer if the legislature had used the words "by virtue of any rule made under the provisions of the Act." But we do not think that that slight error in drafting the section would affect the question whether the rule was *intra* or *ultra vires*. It was contemplated that rules might be made whereby persons should bind themselves or covenant to perform a duty or act or abstain from any act. Consequently we think that the rule was made not only to carry out the provisions of the Act, but also in order to amplify the provi-

sions of S. 84. We see no reason to think, therefore, that the rule can be said to be *ultravires* of the local Government.

It was contended that the local Government would have no power to promulgate any rule which made an alteration in the ordinary law of contract unless express power to do so had been given in the Act. We cannot agree with that argument. Reliance was then placed on a passage in Maxwell on Interpretation of Statutes, 6th Ed., p. 523:—

“Rules and by-laws made under the statutory powers enforceable by penalties are construed like other provisions encroaching on the ordinary rights of persons. They must, on pain of invalidity, be not unreasonable, nor in excess of the statutory power authorising them, nor repugnant to that statute or to the general principles of law.”

It cannot be said that this rule we are now considering is in excess of the statutory power authorising it, nor is it repugnant to the statute. It only remains to be considered whether it is repugnant to the general principles of law. That phrase is a somewhat wide one, and we do not think that it excludes the power to make a rule which is repugnant to a particular statute in force at the time. As pointed out by the Advocate General, it is neither unreasonable nor unfair, and there was a distinct object in passing that rule, namely, to facilitate the operations of the Forest Officer for disposal of the forest produce. An offer or tender for a certain amount had to be submitted to the Divisional Forest Officer; and the tender in this case being for more than Rs. 5,000 that officer had no authority to finally accept it, but had to submit it for approval to the Conservator of Forests; consequently there must necessarily have been some delay before that tender could be accepted and the acceptance notified to the tenderer and if it was open to a tenderer to revoke his tender before the acceptance of it was notified to him, it would be extremely difficult for the Forest Officers to conduct sales of forest produce.

It has, therefore, not been shown to us that the local Government had no power to promulgate a rule which was contrary to the provisions of Ss. 5 and 25 of the Indian Contract Act; as the local Government had special power to make rules, so far as they were consistent with the

Indian Forest Act, and as such rules, when made, have the force of law, the result must be that this rule being made in order to carry out the provisions of the Act, and not being inconsistent with the Act, must be considered as taking its place within the Act.

We think the appeal must succeed and the plaintiff's suit dismissed. The appellant will get his costs in this Court, but we do not disturb the order of costs in the trial Court. The cross-objections are dismissed with costs.

With regard to the claim made to us after judgment was delivered, by the respondent that he deposited Rs. 200 for each of the five coupes for which he tendered, making Rs. 1,000 for all, so that he would be entitled to a refund of Rs. 800 in any event, we can only say that there are no materials before us on which we can decide whether the plaintiff is entitled to such a refund. He never mentioned that claim in the proceedings in the trial Court, and there was no issue raised thereon. It would be impossible for us, sitting as we are in appeal under the Letters Patent, to decide a question of fact on which there is no evidence. If, however, as a matter of fact the plaintiff tendered for five coupes and made a deposit of Rs. 200, as he now says, against each separate tender, then if the tender was not accepted for four coupes, ordinarily speaking he would be entitled to the return of his deposit *pro tanto*, and we presume he is still entitled to ask for that return, as the period of limitation would run from the date of demand of such deposit and its refusal.

Crump, J.—I concur.

Coyajee, J.—I concur.

Appeal allowed.

★ 1925 BOMBAY 489

FAWCETT AND MADGAONKAR, JJ.

Emperor

v.

Jagardeo Ramsumer Tewari—Applicant.

Criminal Application for Revision
No. 128 of 1925, Decided on 18th June
1925.

★ *Foreigner's Act, (III of 1864) S. 1 as amended by Act. III of 1915, S. 2—Cession of territory by Britain to another State—British subject ceases to be such on cession—Residence in British India for trade purposes does not change status of foreigner.*

A relinquishment of the government of a territory is not only a relinquishment of the right to the soil or territory, but also of the rights over the inhabitants of the country. The distinction between a right of election of which sovereign he will become the subject and the method by which a man can leave a newly ceded territory and remain within the allegiance of his former sovereign, seems somewhat fine; but the distinction is one between a mere assertion of elected allegiance and actual conduct clearly showing such an election. It is not enough for an inhabitant to assert, when the question arises, that he has elected to remain within the allegiance of his former sovereign; there must be conduct on his part, such as leaving the ceded territory and going to reside permanently in his former sovereign's dominions to indicate his previous election. Any inhabitant of the ceded or separated territory has not the right to remain an inhabitant of it, and at the same time to retain the allegiance and nationality of the State which ceded or permitted the separation. The common law of England embodying the above rules is the law for the time being in force in British India within the meaning of the proviso to S. 1. 18 Cal. 620 P. C. and 42 Mad. 589 (P. C.) *Foll.*

[P. 490 C. 2, P. 491 C. 1, 2, P. 493 C. 1]

The applicant was born in Ramdupati which was in British territory. In that village he had some lands and owned a house in which his family resided permanently. He, however, came to Bombay for purposes of trade. Ramdupati was subsequently ceded to the Maharaja of Benares by the British Government. The applicant continued to live in Bombay for trade before as well as after the cession.

Held: that the applicant was a "foreigner" by virtue of the proviso to S. 2 of Act III of 1915, amending the Foreigners Act, 1864.

Kanga and S.S. Patkar—for the Crown.

Kazi Kabiruddin and Y. V. Bhandarkar—for Applicant.

Fawcett, J.—This is a rule which has been issued against the Jailor, Yeravda Jail, calling upon him to show cause why the petitioner Jagardeo Ramsumer Tewari should not be brought before this Court to be dealt with according to law and why

he should not be set at liberty, etc., in the exercise of this Court's power under S. 491, Criminal Procedure Code.

The main facts of the case are not in dispute. The father of the petitioner was born at the village of Ramdupati, which at that time was in the Mirzapur district of the United Provinces. But some thirty or forty years back he came from there to Bombay, where he kept buffaloes and carried on a milkman's business. He had several sons, the third of whom is the present petitioner, who is stated to be about thirty years old. According to the affidavit which has been filed on petitioner's behalf, and which is supported by other affidavits, the eldest son came to Bombay in about 1908. But after staying there for about twelve months he fell ill and went to his village, where he died. After that in 1909 Sahadev, the second son of the father Ramsumer, came to Bombay, but only stayed there for about five months. He also fell ill and went to his village, and the father then brought his third son, the present petitioner, to Bombay in 1909. There is a dispute as to whether the petitioner really came to Bombay in 1909. In the affidavit made by Mr. Cauty, the Deputy Commissioner of Police, Bombay, he states that his information is that the petitioner came in or about 1914. But it is, I think, really immaterial whether he came in 1909 or 1914, so far as the main point in dispute in this case is concerned. The father Ramsumer subsequently became ill and returned to his native village where he died. After his death the business appears to have been carried on by the present petitioner with the assistance of some of his brothers. In 1911 there was a cession of territory by the Government of India to the Maharaja of Benares, and the ceded territory contains this particular village of Ramdupati. A copy of the instrument of transfer has been annexed to Mr. Cauty's affidavit and the preamble of this shows that the cession was made with the approval of His Majesty's Secretary of State for India, with the object that there should be constituted a State under the suzerainty of His Majesty to be granted to the Rajas of Benares, subject to certain restrictions and conditions considered necessary for safeguarding to the residents of the ceded territories the rights and privileges they had enjoyed under the British administration. There are no doubt restric-

tions on the sovereignty that is conferred upon the Maharaja of Benares and his successors but it has not been disputed before us that there has been in fact a change in the sovereignty which primarily affects the inhabitants of the ceded territory, *i. e.*, affects their allegiance in a way that is recognised and I shall deal with later on.

It is contended for the petitioner that he was a British subject at the time of this cession and that he has not ceased to be a British subject. The importance of this is apparent, when reference is made to the definition of "foreigner" which is contained in the Foreigners Act III of 1864, as amended by Act III of 1915. There is no doubt that the petitioner would fall under clause (a) of this definition as being a 'natural born British subject' at any rate prior to the cession of 1911, and that has not been disputed by the learned Advocate-General for the Crown. But the contention that is put forward on behalf of the Crown is that the petitioner has ceased to be a British subject, and therefore comes within the proviso to this definition which is as follows :

"Provided that any British subject who under any law for the time being in force in British India ceases to be a British subject shall thereupon be deemed to be a foreigner."

The Government of Bombay, in the exercise of powers conferred upon them by S. 4 of the Foreigners Act, have issued an order to the petitioner to remove himself from British India. It is not necessary to recite what has happened upon that order, except to say that the petitioner did leave Bombay but was subsequently found in Andheri, a suburb of Bombay, was arrested and eventually sent to the Yeravda Jail. He questions the validity of this order of the local Government on the ground that he is not a foreigner. Some other points have been mentioned in the petition, but that is the sole point which has been pressed before us.

I do not think it necessary to go exhaustively into all the legal questions of nationality and change of status that arise in different cases of this kind. We have first of all to bear in mind that S. 2 of the Foreigner's Act enacts that :

"If a question shall arise whether any person alleged to be a foreigner and to be subject to the provisions of this Act is a

foreigner or not, or is or is not subject to the provisions of this Act, the onus of proving that such person is not a foreigner, or is not subject to the provisions of this Act, shall lie upon such person."

If the rule that has been laid down in English cases as to the effect of cession on the question of the nationality of persons ordinarily resident in the ceded territory is followed and held applicable, then there can, I think, be no question that the petitioner must be held to have ceased to be a British subject. The main rule in a case of this kind is summarised in Halsbury's Laws of England, Vol. I, Art. 696, page 317, as follows :

"Such treaties (that is treaties like the one that was made with the United States of America in (1783) may specifically regulate the future nationality of the inhabitants of the ceded territory, but in the absence of an express provision, a relinquishment of the government of a territory is not only a relinquishment of the right to the soil or territory, but also of the rights over the inhabitants of the country."

That seems obviously in accordance with common sense, because you cannot well have a sovereign without subjects ; at any rate if there is a State, the ordinary idea of constitutional law is that there are subjects in that State who are ruled over by the sovereign, and naturally when a territory is ceded the inhabitants of that territory will become subjects of the sovereign to whom the territory has been ceded. Of course a question can arise as to whether a particular person is an inhabitant of the territory, or even if he is not an inhabitant, whether he has such a connection with the territory as to make him subject to this general rule about change of nationality upon cession. This question has been discussed in certain English cases of which the latest one is *In re. Stepney Election Petition : Isaacson v. Durant* (1). In that case at page 60 Lord Coleridge, C. J., very strongly rejected the contention that in all cases where conflicting duties of allegiance arise the subject has by general law, law which has been adopted into English law, a right of election of which sovereign he will become the subject. And with reference

(1) [1886] 17 Q.B.D. 54=55 L.J., Q.B. 331=54 L. T. 684=34 W. R. 547.

to the case of *Doe dem. Thomas v. Acklam* (2) he says that the decision was not based upon any such right of election, but on the ground "that the King having set free the inhabitants of the States from their allegiance, they became aliens." He goes on to say (p. 60):

"No doubt, if a man had chosen to leave the States newly recognised as independent, and had gone into England or the English dominions he would have remained what he was before, a British subject and within the allegiance of the British sovereign. But why? Because he never became a citizen of the newly established and recognised States."

Then discussing the case of *Auchmuty v. Mulcaster* (3) he held that it does not help the claim to the alleged right of election. At first sight the distinction between such a right of election and the method by which a man can leave a newly ceded territory and remain within the allegiance of his former sovereign seems somewhat fine; but, as I understand it, the distinction is one between a mere assertion of elected allegiance and actual conduct clearly showing such an election. It is not enough for an inhabitant to assert, when the question arises, that he has elected to remain within the allegiance of his former sovereign: there must be conduct on his part, such as leaving the ceded territory and going to reside permanently in his former sovereign's dominions, to indicate his previous election. I think the general principle has been well expressed in Foote's "Private International Jurisprudence," 4th Edn., at pp. 8 and 9, where he says, referring to the case of allegiance dissolved by cession, etc.,

"On such a dissolution, the resident inhabitants of the territory ceded, separated, or conquered, lose their former nationality and become subjects of the new State to which they are assigned or attached. It has been sometimes said that the inhabitants of the separated territory have it at their own election to determine to which sovereign they shall bear allegiance in the future. There can be no doubt that such an option may be given by the express provisions of the treaty or statute by which the separation is governed, in which case a definite period is usually named within which the

option must be exercised by quitting or remaining inhabitants of the ceded or separated territory. Where no such option is expressly given, the question has been treated by Lord Coleridge, C. J., as one of fact. When a sovereign by treaty relinquishes his claim to the allegiance of the inhabitants of specified territories, it becomes a question of fact whether a particular individual remained after the cession (or the limited time) an inhabitant of the specified territory and became thereby a citizen of the State into which it passed as an integral part. In no case has it been held that any inhabitant of the ceded or separated territory has the right to remain an inhabitant of it, and at the same time to retain the allegiance and nationality of the State which ceded or permitted the separation."

There is also a passage in Hall's "International Law," 7th Edn., which I think may be appropriately cited as helping in the disposal of this particular case. At pages 611 to 613 he says:

"It has, however, been usual in modern treaties to insert a clause securing liberty to inhabitants of a ceded country to keep their nationality of origin. In the case of persons native of, and established in, the ceded territory, and even in the case of persons who are established in without being natives of, the ceded territory, this liberty is commonly saddled with the condition that they shall retire within the territory remaining to their State of origin, a certain time being allowed to them to arrange their affairs and dispose of landed and other property which they may be unable to take with them . . . Residence in foreign countries being a frequent incident of modern life, withdrawal from a ceded district is not conclusive of the intention of the person withdrawing to reject the nationality of the conquering State. It is therefore usual to exact an express declaration of intention, as a condition of preservation of the nationality of birth from persons against whom there is a presumption of changed nationality, that is to say, from persons born within the territory and living there, and from persons born within the territory but absent at the date of annexation. [This last sentence applies to the petitioner, if, as alleged, he was absent in Bombay at the date of cession in 1911]. There being no such presumption against persons born in another part of the State making the

(2) [1824] 2 B. & C. 779.

(3) [1826] 5 B. & C. 771.

cession, the simple fact of withdrawal is in their case sufficient."

This seems to me to be reasonable and to supply cogent authority for saying that the mere fact of the petitioner and his father having carried on business in Bombay does not suffice to show that he has withdrawn himself from the operation of the general rule under which, as a former and still a periodical occasional inhabitant of this village of Ramdupati, he has since the date of cession become a subject of the Raja of Benares. We have not of course before us such materials as might be available if there had been a civil suit in which this point was in issue. But the admissions before us at any rate supply materials from which, I think, it can be properly concluded that this family has certainly not severed all connection with their village Ramdupati. Admittedly they have certain ancestral land there in which the petitioner has a share. I have already mentioned the fact that the father and various sons, on falling ill, returned to this village. An allegation has been made in Mr. Cauty's affidavit that the family of the petitioner is at present at Ramdupati, and I agree with the learned Advocate General that it is significant that the counter affidavit contains no direct contradiction of this allegation or any statement that the petitioner's family have in fact been brought to and kept in Bombay. I think that if that were the case it would certainly have been put as part of the petitioner's case in the main petition, just as he has put the fact that for a number of years he and his father have carried on business in Bombay. As I have already said, the onus of showing that he has ceased to be a foreigner rests upon the petitioner, and if the ordinary rules of law upon this subject are applicable in this case, then, in my opinion, he has not satisfied that onus.

It was, however, urged by the petitioner's counsel that the common law of England embodying these particular rules on which I have relied is not a "law for the time being in force" in British India within the meaning of the proviso to S. 1 of the Foreigners Act III of 1864, as amended by S. 2 of Act III of 1915. His contention is that a law to fall within this expression must be a statutory law, which alone can be said to be "for the time being in force" in British India. I think, however, it is nowadays too late to raise such

a contention. The Privy Council have recognised the validity of the common law of England in British India in various cases. One of these is *The Irrawaddy Flotilla Company v. Bugwandas*, (4) where their Lordships observe.

"For the present purposes it is not material to inquire how it was that the common law of England came to govern the duties and liabilities of common carriers throughout India. The fact itself is beyond dispute. It is recognised by the Indian Legislature in the Carriers Act 1865 an Act framed on the lines of the English Carriers Act of 1830 (II Geo. IV, and I Wm. IV, c. 68.)"

And dealing as we are with this particular case under S. 491, Criminal Procedure Code, that is to say, as a High Court established by the Letters Patent and the successors of the former Supreme Court of Bombay, it is clear that the common law which was formerly administered by the Supreme Court, is also part of the law to be administered by the present Court, unless it is superseded by statute or otherwise. Their Lordships of the Privy Council in *Maharaja of Jeypore v. Rukmini Pattamahadevi* (5) say:

"They (the High Courts) are directed by the several charters to proceed where the law is silent, in accordance with justice, equity and good conscience, and the rules of English Law as to forfeiture of tenancy may be held, and have been held, to be consonant with these principles and to be applicable to India."

Of course this common law can only be applicable when it is properly applicable to the society and circumstances of India. I cannot, however, conceive of any department of law in which the common law is more applicable than that part of constitutional law, which governs the question of nationality and the question of the status of British subjects. Naturally that would be part of the English common law, which was brought into this country when the British obtained sovereignty in India. Thus "in 1661 Charles II gave, by royal Charter to the Governor and Council of the several

(4) [1891] 18 Cal. 620=18 I. A. 121=6, Sar. 40 (P. C.).

(5) [1919] 42 Mad. 589=36 M. L. J. 543=7 A. L. J. 552=29 C. L. J. 528=21 Bom. L. R. 655=(1919) M. W. N. 271=23 C. W. N. 889=50 I. C. 631=26 M. L. T. 16=10 L. W. 331 (P. C.).

places belonging to the Company in the East Indies, power 'to judge all persons belonging to the said Governor and Company or that should live under them in all causes, whether civil or criminal, according to the laws of the kingdom, and to execute justice accordingly.'" (See Tagore Law Lectures 1872: The History and Constitution of the Courts and Legislative Authorities in India by Cowell, p. 16. Therefore, I reject the contention that the English common law cannot be a part of the law for the time being in force in British India. There is no statute, so far as I am aware, which in any way affects its applicability, in this case, at any rate none such has been cited. In the circumstances of this case I find that the petitioner has failed to show that he has not ceased to be a British subject in view of the cession of 1911 already mentioned. In my opinion, therefore, there is no proper ground for the exercise of our powers under S. 491, Criminal Procedure Code, which is sought by the petitioner. I would, therefore, discharge the rule. Any question of costs can be considered later.

Madgaonkar, J.—On January 10, 1925, an order was passed by the Local Government against the petitioner under S. 3 of India Act III of 1864, ordering him as a foreigner to remove himself from British India. With this order he complied. But on March 19 he was found to have returned to British India and was arrested at Andheri. He is now in confinement in the Yervada jail; and the legality of this confinement is questioned in this application, mainly on the ground that he is not a foreigner but that he continues to be a British subject.

The petitioner was born a British subject at Ramdupati, which, along with the adjacent villages, was on April 1, 1911, ceded and constituted as a Native State under the jurisdiction of His Highness the Maharaja of Benares. It is argued for the petitioner that he was a resident of Bombay on the date of the treaty and that, apart from stray visits to Ramdupati, he has continued to carry on his father's business in Bombay and that he thus continues to be a British subject. The treaty, it is said, does not confer unrestricted powers such as the power of life and death on the Maharaja of Benares so as to create a new political entity.

The words "any law for the time being in force" in S. 2 of the amending Act III of 1915 apply only to statutes.

For the Crown it is argued by the learned Advocate General that the cession of territory under the treaty necessarily includes a change of sovereignty and allegiance, and therefore the petitioner is a foreigner within the meaning of Act III of 1864 as amended by Act III of 1915.

Under S. 2 of the Act of 1864 the onus of proving that he is not a foreigner is expressly laid on the petitioner. And the substantial question therefore under the proviso to S. 2 of Act III of 1915 is whether the petitioner, by virtue of the treaty of April 1, 1911, has or has not ceased to be a British subject.

Whatever the difficulties of locating sovereignty in the Austinian sense, the treaty clearly creates a political jurisdiction and a political agent previously non-existent. For all practical purposes, the latter appears to be a decisive test, unaffected by the various limitations on the Maharaja's powers such as those in clause 17 in respect of jurisdiction over servants of the British Government and European British subjects or in clause 25 in respect of death sentences. Kathiawar, to go no further, illustrates the point that such limitations of varying degrees are perfectly consistent with the existence of foreign political status, in the legal sense, both civil and criminal.

A certain amount of stress has been laid for the petitioner on the words "under any law for the time being in force" to be found in S. 2 of Act III of 1915; and the question was argued whether the word 'law' is restricted to statute law or whether it includes Common law. On general principles of interpretation, it is hardly open to the Courts to limit the word by the implicit addition of 'statute' before it. And on broader grounds, whatever the case in the days of Machiavelli, it is now too late in the day to raise the question of the binding nature of treaties and the duty, in matters civil and criminal, of enforcing and abiding by their terms, incumbent on all the contracting Powers and their Courts, not less than in the case of laws passed by the legislature. Our reports are full of such cases, as, for instance, from Kathiawar, in matters of succession, domicile and extradition.

And it is not necessary to fortify them by recent illustrations of the enforcement by Courts in England of various clauses of the Treaty of Versailles. For the purposes of the present application, this treaty, in my opinion, is as much law binding on the Courts as any statute law of the legislature. And the only point for the petitioner is perhaps that the treaty does not in terms declare that the Indian subjects in the ceded territory have ceased to be British subjects.

But that a treaty of cession has by implication such effect has been amply shown in the judgment of my learned brother. In the case of *In re Stepney Election Petition: Isaacson v. Durant* (1), it is to be noted that the decision proceeded on the fact that on the death of William IV the succession to the Kingdom of Hanover, unlike the succession to the Crown of Great Britain, was governed by Salic law. But whatever the legal aspect in so peculiar a case, not of treaty but of succession, speaking for myself, I should incline to the opinion that where, as in the present instance, the case is one of a treaty and of rights created thereunder, it would be open to a subject of the ceded territory, unless the treaty expressly forbade, to elect to continue his former nationality and to prove such election. And, in this opinion, I am supported by the cases of *Doe dem. Thomas v. Acklam* (2) and of *Jephson v. Riera* (6), as well as by the argument at page 58 in *In re Stepney Election Petition* (1). Further, in the present treaty, clause 22, which empowers a British subject to call upon the Maharaja within a year to acquire immovable properties belonging to such subject, is, in my opinion, a clear indication that the subject here could so elect.

In the present case, therefore, the question reduces itself to whether the petitioner can show that on or after April 1, 1911, he elected to continue his nationality as a British subject; or whether he accepted the altered nationality under the treaty. Here again the onus is, in my opinion, clearly on the petitioner not less than it would be in the case of domicile: "The abandonment or change of a domicile is a proceeding of a very serious nature, and an intention to make such an abandonment must be proved by

(6) [1835] 3 Knapp 130.

satisfactory evidence": *Huntley (Marchioness) v. Gaskell* (7). In the present instance it would appear that the homestead of the family of the petitioner and his brothers, like their father's has continued to be Ramdupati; the lands are retained; and the residence of the petitioner and his brothers and their family in Bombay was solely for the purpose of business. The case is one of very common occurrence in the city of Bombay, and I agree with my learned brother that such residence of itself, or of continuance of it, is not sufficient evidence of election or of continuance of the petitioner's former status as a British subject.

Into the alleged hardship of the present case we are not competent to enter.

I agree, therefore, that the petitioner has not discharged the onus laid on him by law to show that he is not a foreigner, and the rule must be discharged.

PER CURIAM.—The rule is accordingly discharged.

The learned Advocate-General asks that under clause (5) of rule 7 of the High Court Rules, Appellate Side, of 1920, the Court should allow costs against the petitioner on the Appellate Side scale. We think, however, that the petitioner had legitimate ground for seeking the Court's decision on the question whether he was or was not a foreigner, and in the circumstances we are not disposed to grant costs against him. The rule is, therefore, discharged without costs.

Rule discharged.

(7) [1906] A. C. 56=94 L. T. 33=75 L.J., P.C. 1=22 T. L. R. 144.

★ 1925 BOMBAY 494

MACLEOD, C. J., AND COYAJEE, J.

Ajitsing Manibhai and others--Defendants--Appellants.

v.

Grunning & Co.--Plaintiffs--Respondents.

First Appeal No. 173 of 1924, Decided on 14th April, 1925, from the decision of the First Class Sub. J., Ahmedabad, in Suit No. 1039 of 1922.

★ (a) *Civil P. C., O. 30, R. 1—Proper title of suit indicated.*

It is not correct to sue persons as partners in the name of the firm by a partner or manager. The proper title of defendant in such a suit is: A a firm, B, C, D, partners in the said firm.

[P 495 C 1]

★ (b) *Civil P. C., O. 30, R. 6—Statements of all partners are statements of the firm—Personal defence can be put in only if he is sued personally along with the firm.*

Under O. 30, R. 6, where persons are sued as partners in the name of their firm, they shall appear individually in their own names but all subsequent proceedings shall nevertheless continue in the name of the firm. Thus each partner can put in a separate written statement, but each written statement is the written statement of the firm. However, it is only when a person is sued personally along with the firm that he may put in a personal defence. [P 496 C 1]

G. N. Thakor with R. J. Thakor—for Appellants.

Little & Co., and S. S. Dutkar—for Respondents.

Macleod, C. J.—The plaintiffs are a firm carrying on business in cotton in Liverpool.

They have filed this suit through their constituted attorney in the Court of the First Class subordinate Judge at Ahmedabad against the firm of Chandrasing M. Jesingbhai by its partners and managers (1) Ajitsing Manibhai, (2) Chandrasing Manibhai, a minor, by his next friend, to recover damages amounting to Rs. 13,870-4-0 and interest and the costs of a solicitor's bill. In the first place it must be noted that the title of the plaint is not correct. Under Order 30, rule 1, any two or more persons being liable as partners and carrying on business in British India may be sued in the name of the firm. In such a case the proper title of the defendant is: "A B, a firm carrying on business in partnership at," See Appendix A to the Civil Procedure Code, (2) "Description of parties in particular cases." Rule 3 provides for the manner of service of the summons where persons are sued as partners in the name of their firm and Rule 6 provides for the manner of appearance of such persons. An individual partner may be sued personally along with the firm: *Taylor v. Collier & Co.* (1). It is not therefore correct to sue persons as partners in the name of the firm by a partner or manager and the proper title of the defendants in the suit should have been:

"Defendant 1: Chandrasing M. Jesingbhai, a firm.

Defendant 2; Ajitsing Manibhai, a partner in the firm;

Defendant 3, Chandrasing Manibhai, a partner in the firm."

It does not appear from the way in which the plaint is drafted whether there are three defendants or only one, the firm of Chandrasing M. Jesingbhai.

Although the written statement is headed

"Plaintiff: The Grunning Company.
v.

Defendant: Chandrasing Manibhai, a firm,"

it is signed by Ajitsing Manibhai for himself and as guardian of the minor Chandrasing Manibhai.

Para. 2 states: "The suit filed by the plaintiffs against us the defendant No. 1 and the minor defendant No. 2, is false."

Para. 3 states that Ajitsing was only doing the work of management of the firm and was neither a partner nor a proprietor. the plaintiffs had no right to file a suit against him personally or against the person of defendant No. 2. Therefore the suit could not be maintained.

The further defences in the written statement may be summarised as follows:

Although the plaintiffs stated that they had purchased 100 bales American cotton January, delivery 1921, on behalf of defendants, defendants did not accept the contract as it was received late, and even before it was signed plaintiffs asked for margin. Plaintiffs should have closed the transaction when the market began to go down. If margin was not given the plaintiffs could not leave the transaction outstanding. Damages could only be claimed according to the rate prevailing on the day on which the rates began to go down.

The provisions of Order 30 are very complicated and technical, and are seldom sufficiently studied by practitioners in the Subordinate Courts. A summons under Order 30, rule 3, shall be served either upon any one or more partners, or at the principal place at which the business is carried on within British India upon any person having at the time of service the control or management of the partnership business there.

It seems that the summons in this case was served on Ajitsing, so that was good service on the firm, since whether he was

a partner or not, he admits that he was the manager.

Under Order 30, rule 6, where persons are sued as partners in the name of their firm, they shall appear individually in their own names but all subsequent proceedings shall nevertheless continue in the name of the firm.

It is not easy to observe the provisions of this somewhat incongruous rule.

Each partner has to appear individually, each partner can put in a separate written statement but each written statement is the written statement of the firm. It is only when a person is sued personally along with the firm that he may put in a personal defence.

In this case there is no written statement of the firm though it may be said that the defences raised in the written statement of Ajitsing were the same defences as would have been raised in a written statement by the firm.

In this state of the record, the Judge should have drawn the plaintiffs' attention to the provisions of Order 30, rule 8.

Ajitsing was protesting that he was not a partner. Plaintiffs could disregard the appearance under protest altogether and have the summons served as provided by rule 3, or they could contend that the person served was a partner at the time the cause of action accrued, and apply on that basis either to have the appearance entered struck out, or to have the denial of partnership struck out of the appearance.

None of these courses was chosen by the plaintiffs. The suit proceeded as if the firm had been duly served, as well as the individuals alleged to be partners.

Issues Nos. 1 to 10 were raised on the merits. The answer to issue No. 11, 'Are the defendants 1 and 2 liable under the contract' was 'The defendant firm are liable.'

The answer to issue No. 12, 'Are defendants 1 and 2 personally liable under the plaintiff's claims' was 'Defendant 1 is liable.'

A decree accordingly was passed against the firm of Chandrasing M. Jeshingbhai and against Ajitsing as one of its partners. The firm and Ajitsing appealed and appeared by the same counsel.

The principal grounds of appeal were :

1. That the Subordinate Judge had erred in holding that Ajitsing was a

partner instead of holding that his mother was the sole proprietor of the firm.

2. That he had erred in not holding that there was no agreement.

3. That he had erred in not holding if there was a valid agreement that the plaintiff should have re-sold the goods at a much earlier date.

4. That the loss actually suffered had not been proved.

Not a single objection was raised with regard to the service of the summons or the frame of the pleadings.

It would not then be equitable for this Court in the circumstances of the case to do more than we have done in pointing out the defects of the procedure in the lower Court, since the merits of the case have in no way been affected thereby.

We accept then the fact that a decree has been passed against the firm and against Ajitsing personally, and that both the firm and Ajitsing have appealed against that decree.

[His Lordship after dealing with the merits of the case proceeded:]

I think the plaintiffs are entitled to succeed, but they are not entitled to interest on the claim before the date of the suit, nor can they recover the amount of their solicitors' costs before suit. There will, therefore, be a decree for Rs. 13,870 with interest at six per cent. from the date of the suit until judgment with costs in both Courts in proportion, with interest on judgment at six per cent.

Coyajee, J.—[His Lordship after setting out the facts, proceeded:]

While the arguments were proceeding, the learned Chief Justice called the attention of the parties to the defect in the pleadings. A reference to the plaint and the written statement in this case shows that not much regard was paid to the rules which regulate suits against firms (Order 30, Code of Civil Procedure, 1908). The parties themselves, however, apparently felt no embarrassment on that account. In a suit against a firm, it is permissible to the plaintiff to make one or more partners defendants in conjunction with the firm. In the plaint in this case Ajitsing is described both as the manager of the firm and a partner. He accepted service of the summons; he signed and put in the one written statement in the case; he also signed the vakalatnama which accompanied it. Some of the issues framed in the suit

related to the merits of the plaintiffs' claim : but there were others which had reference personally to Ajitsing and Chandrasing. In these circumstances, the decree of the lower Court cannot be disturbed merely on account of this defect unless it affected the merits of the case or the jurisdiction of the Court : and it is not contended that any of those results has followed in this case (S. 99, Code of Civil Procedure).

[In conclusion his Lordship concurred in the order of the learned Chief Justice.]

Appeal dismissed.

★ 1925 BOMBAY 497

MACLEOD, C. J., AND CRUMP, J.

Amolakchand Laduram and others—Appellants.

v.

Motilal Agiariram—Respondent.

First Appeal No. 68 of 1923, Decided on 12th December 1924, from the decision of the Sub-J., Dhulia, in special Civil Suit No. 448 of 1921.

★ *Hindu Law—Decree against father as manager—Whole interest of family passes under the sale unless proclamation states otherwise.*

Where a decree is passed against the father carrying on business in the name of the family as manager, the whole of the family property is liable for the family debt, and when the property of the debtor is put up for sale, the whole interest of the family passes to the purchaser unless it is clearly stated in the proclamation that the interest of the father alone is sold under the decree.

[P. 498 C. 2]

G. N. Thakor and M. Y. Bhat—for Appellants.

V. S. Bhandarkar and Y. V. Bhandarkar—for Respondent.

Judgment.—The plaintiffs prayed for a declaration that their interest in the suit lands was neither put up to sale in Darkhast No. 19 of 1919 nor purchased by defendant No. 1, Motilal, and for partition. The plaintiffs are minors who with their father, defendant No. 2, constituted a joint Hindu family. In 1915 Motilal filed a suit against the second defendant in the Bombay High Court in respect of certain trade transactions which defendant No. 2 had made with him as his *adatya* in Bombay. Laduram was therein described as manager of the joint family consisting

of himself and his minor sons and carrying on as such manager a joint family business at Mandal as a merchant. Defendant No. 2 contended that he was an agriculturist ; that the High Court had no jurisdiction ; that the transactions sued on were all wagering transactions and made without any lawful consideration, and further set up a counterclaim against defendant No. 1. The High Court disallowing all these contentions passed a decree against the second defendant in favour of Motilal for Rs. 13,235-14-1 on December 16, 1918. In execution of that decree under Darkhast No. 119 of 1919 Motilal got attached certain lands of defendant No. 2. Out of them, eight lands, the subject-matter of this suit, were purchased by Motilal himself with the Court's permission. In taking possession Motilal was obstructed by Bhuribai, the wife of the second defendant, purporting to act as the guardian of the minor sons on the ground that their interests in the lands had not been sold. This led to an application by Motilal for removal of the obstruction and delivery of possession of the entire lands to him. The Court granted that application and ordered possession to be given to him. The plaintiffs then filed this suit.

We do not quite follow the arguments which appear to have prevailed in the trial Court on a preliminary point. The Judge said the suit should fail because the plaint had not been amended. It is a perfectly proper suit. In the circumstances of the case the sale had already been made to the purchaser, and therefore the plaintiffs had to sue for a declaration that their interest had not passed at the sale.

On the merits the plaintiff's claim was dismissed with costs on the ground that defendant No. 2 described himself as manager of the joint Hindu family, that the decree was against the family property, and that the sale by the Court was of the interest of all the members of the family, which thereupon passed to the purchaser.

The appellants rely upon the High Court Circular No. 69 (7), which purports to give directions with regard to the preparation of the proclamation for sale in execution proceedings. In circular No. 69 (6) it is said that the object of the enquiry under S. 287 of the Civil

Procedure Code of 1882, now Order XXI, rule 66 of the Code of 1908, is merely to collect particulars to be inserted in the proclamation for the information of intending purchasers. The conclusions arrived at in this enquiry are not subject to appeal; for they are not determinative between the parties. In sub-clause 7 it is stated that the enquiry shall be completed as soon as possible. When it is finished, the proclamation of sale shall be prepared in the form prescribed (No. 29, Appendix E, Schedule I, of the Code). If in the case of a Hindu judgment-debtor it is desired to sell the interest of any other member of the family (*e. g.*, that of a minor son or brother) the name of such member, and the fact that his interest is being sold, must be stated in the proclamation, as otherwise his interest will not pass to the purchaser. That would really mean that in all proclamations of sale, when the property of a Hindu judgment-debtor is put up for sale, and nothing is said about the interest of other members of his family, a condition should be implied that only his interest passes to the purchaser even though he is described as the manager of the joint Hindu family, and it had not been suggested that the debt or claim for which the property was being sold was not a proper debt or claim against the family. Now the law with regard to such proclamation of sale is laid down in *Sripat Singh v. Prodyot Kumar Tagore* (1), where the facts are exactly similar to the facts in this case. The property which belonged to a joint Mitakshara family, consisting of a father and two sons, was sold in execution of decrees against the father, the order and notices providing for the sale of the right, title and interest of the judgment-debtor. It appeared from the circumstances in which the above words had been inserted, from the conduct of the sons, and the price paid by the execution creditor that it was a sale of property over which the father had a disposing power. It was held that the substance and not the technicalities of the transaction should be regarded and that the entire property passed to the purchaser. The observa-

tions in *Rai Baba Mahabu Pershad v. Rai Markunda Nath Sahai* (2) were affirmed. That case was followed by this Court in *Dada v. Vesu* (3), where again there was a mortgage decree executed by the father the first defendant in the suit. The mortgagee purchased the property at the Court sale, and the plaintiff sued the first defendant and his sons to recover possession. The sons contended they were not parties to the prior suit and that their interests were not affected by the sale. No reference appears to have been made to the High Court circular, and it was held that the interest of all the members of the family passed under the execution proceedings to the purchaser.

We have been referred to *Timmappan v. Narsinha Timaya* (4) and *Hanmandas Ramdayal v. Valabhdas* (5). In *Timmappan v. Narsinha Timaya* (4) the High Court circular was actually incorporated in the proclamation, and therefore the purchaser knew exactly what he was purchasing. If it had been expressly mentioned in the proclamation in this case that the interest of the father only passed, then undoubtedly the plaintiffs would be able to succeed.

But the circular has not been incorporated in the proclamation of sale and therefore we have to apply the ordinary law, as laid down in the decided cases, in order to ascertain what passed to the purchaser, for the circular cannot be considered as laying down the law by which we are bound, so that we must hold that the interests of the sons were not purchased, because they were not mentioned in the proclamation. Consequently, as a decree was passed against the father carrying on business in the name of the family as manager, the whole of the family property was liable for the family debt, and when the property of the debtor was put up for sale, the whole interest of the family passed to the purchaser.

Therefore, we agree with the judgment of the Court below and dismiss the appeal with costs.

Appeal dismissed.

(1) [1916] 44 Cal. 524=44 I. A. 1=32 M. L. J. 133=15 A. L. J. 147=(1917) M. W. N. 173=21 C. W. N. 442=25 C. L. J. 220=21 M. L. T. 222=39 I. C. 252=19 Bom. L. R. 290 (P. C.)

(2) [1889] 17 Cal. 584=17 I. A. 10=5 Sar. 489 (P. C.)

(3) 1923 Bom. 450=25 Bom. L. R. 494.

(4) [1913] 37 Bom. 631=21 I. C. 123=15 Bom. L. R. 794.

(5) [1918] 43 Bom. 17=43 I. C. 133=20 Bom. L. R. 472.

★ 1925 BOMBAY 499

MACLEOD, C. J., AND CRUMP, J.

Limbaji Ravji Hajare—Plaintiff—Appellant.

v.

Rahi Ravji Hajare and others—Defendants—Respondents.

Second Appeal No. 553 of 1923, Decided on 27th January 1925, against the decision of the D. J., at Satara, in Appeal No. 578 of 1921.

★ *Contract Act, Ss. 64 and 65—Minor's property—Sale by step-mother—Purchase money applied in discharging mortgage executed by minor's father—Marriage expenses of minor defrayed out of the money—Sale can be set aside but purchase money must be refunded—Guardian and Ward—S. P. Rel. Act, S. 41.*

Where the step-mother of a minor sold property belonging to the minor in order to pay off a mortgage executed by his father and to meet the marriage expenses of the minor.

Held: that the sale could be set aside at the instance of the minor, but the minor was bound to refund the consideration money.

[P. 449 C. 2, P. 500 C. 2.]

K. N. Koyajee—for Appellant.

P. B. Shingne—for Respondent No. 4.

Macleod, C. J.—The plaintiff filed this suit to recover possession of the plaintiff land which had belonged to his father and had been mortgaged by him to one Tatyada. On his father's death the plaintiff, then a minor, came under the protection of his step-mother. She redeemed the mortgage and sold the land to the father of defendants Nos. 2 and 3 who in his turn sold it to defendant No. 4. Plaintiff claimed that his step-mother had no authority to dispose of his property.

Defendant No. 4, who alone contested the suit, pleaded that the step-mother was the guardian of the plaintiff during his minority; that the lands were sold for legal necessity to pay off the mortgage and provide for the marriage expenses of the plaintiff, and consequently the sale was binding on the plaintiff. If it was held to be not binding, the defendant should be awarded Rs. 800, the consideration for the sale-deed, and Rs. 100 spent by him on improvements. The trial Judge held that the step-mother was not the natural guardian of the minor; that the sale-deed was effected for legal necessity; that Rs. 100 had not been spent on improvements; that the suit was in time; and on those findings dismissed the suit with costs. In appeal

the only issue argued was whether the sale was for the minor's benefit. The District Judge found the issue in the affirmative and dismissed the appeal with costs. We are of opinion that as the sale was by an unauthorised person the plaintiff was entitled to have it set aside.

The issue whether the sale was for legal necessity was irrelevant. But then the question arises whether the plaintiff should recover the property without restoring to the present purchaser the benefit which had accrued to him by the sale effected by his step-mother.

We have been referred to Ss. 64 and 65 of the Indian Contract Act, and it has been argued that on the analogy of those sections a minor who seeks to avoid a sale of his property by some one who had no power to sell must restore any benefit he has received from the unauthorised sale. But when a contract is void *ab initio* as in this case, those sections are not applicable. There is the following passage to the notes under S. 64 in the latest edition of Pollock and Mulla at p. 355: "It does not follow, however, that a minor is entitled to both repudiate his agreement and to retain specific property which he has acquired under it, or to recover money after receiving for it value which cannot be restored. General principles of equity seem incompatible with such a result and it would certainly be contrary to English authority." But in one of those authorities, *Nottingham Building Society v. Thurstan* (1), it was held by the House of Lords, approving the decision of the Court of Appeal, that the mortgage by the female in fact was void under the Infants Relief Act and that the Society was not entitled to any repayment of the advances made to her. Lord Romer, L. J., in the Court of Appeal, said: "The short answer is, that a Court of Equity cannot say it is equitable to compel a person to pay any moneys in respect of a transaction which, as against that person, the Legislature has declared to be void."

When, however, the sale or mortgage which a minor seeks to avoid on coming of age has been made by some one who was *prima facie* entitled to bind the minor, he is bound to refund the purchase-money when his estate has benefited by it, or

(1) [1903] A. C. 6=87 L. T. 529=51 W. R. 278=67 J. P. 129=72 L. J., Ch. 134.

to hold the property charged with the amount of the debt from which it has been freed by the sale. Mayne, 9th Ed., S. 220, and the authorities there cited. But the step-mother of the minor cannot be said to be a person *prima facie* entitled to bind him; and her transaction with the minor's property was not voidable but void.

In *Mohori Bibee v. Dharmodas Ghose* (2), it was held by the Privy Council that a minor was incompetent to contract on the true construction of the Indian Contract Act, so that a mortgage made by a minor was void. The general current of decisions in India had been that the contracts of infants were voidable only. Their Lordships then considered whether the minor on avoiding the mortgage should be ordered to refund the mortgage money, in the following passage at p. 549: "Another enactment relied upon as a reason why the the mortgage money should be returned is S. 41 of the Specific Relief Act (I of 1877), which is as follows: 'Section 41. On adjudging the cancellation of an instrument, the Court may require the party to whom relief is granted to make any compensation to the other which justice may require.' S. 38 provides in similar terms for a case of rescission of a contract. These sections, no doubt, do give a discretion to the Court; but the Court of first instance, and subsequently the appellate Court, in the exercise of such discretion, came to the conclusion that under the circumstances of the case justice did not require them to order the return by the respondent of money advanced to him with full knowledge of his infancy, and their Lordships see no reason for interfering with the discretion so exercised."

In *Nathu v. Balwantrao* (3), a Hindu mother, while her adopted son was a minor and had a guardian of his property appointed to him by the Court, alienated some of the minor's property treating it as her own. At the instance of the minor on attaining majority the sale was set aside, and though it was proved that the purchase money had been applied by the mother in payment of debts for which the plaintiff was liable, the Court refused to order him to refund the purchase money

to the defendant. Chandavarkar J. referred to *Ram Tuhul Singh v. Biseswar Lall Sahoo* (4), where their Lordships said: "It is not in every case in which a man has benefited by the money of another that an obligation to repay that money arises. The question is not to be determined by nice considerations of what may be fair or proper according to the highest morality. To support such a suit there must be an obligation, express or implied, to repay." But the Specific Relief Act had not been enacted when that case was decided, and it was not referred to in *Mohori Bibee v. Dharmodas Ghose* (2).

In *Dattaram v. Vinayak* (5) it was held that the administrator of a minor, appointed under Act XX of 1864, could not sell immovable property held by the minor as a mortgagee in possession without the previous sanction of the Court. But on the question whether the minor on avoiding the transaction should restore the benefit accruing to him thereunder, Chandavarkar, J., referred to the decision in *Mohori Bibee v. Dharmodas Ghose* (2) as an authority for the proposition that the circumstances of a case may be such that, having regard to S. 41 of the Specific Relief Act, the Court may on adjudging the cancellation of an instrument require the party to whom such relief is granted to make any compensation to the other which justice may require. We think, therefore, that we have a discretion in this case when setting aside the sale of the suit property to make it a condition that the plaintiff should refund Rs. 800 which is the amount by which his estate and himself were benefited. The plaintiff would have been responsible on his coming of age for the repayment of the mortgage debt, and he has certainly benefited by the amount spent by his step-mother on his marriage. It was not unnatural that his step-mother should have thought that she was entitled to act as she did in his interest, and she could not have been expected to know that she ought to have applied to the District Court for the appointment of a guardian. If she had made the application she would have had to pay the costs out of the minor's estate. Therefore, in the exercise of our discretion, we impose on the plaintiff

(2) [1903] 30 Cal. 539=30 I. A. 114=7 C. W. N. 441=5 Bom. L. R. 421=8 Sar. 374 (P. C.).

(3) [1903] 27 Bom. 390=5 Bom. L. R. 301.

(4) [1875] 2 I. A. 131=15 B. L. R. 203=23 W. R. 305=3 Sar. 477 (P. C.).

(5) [1903] 28 Bom. 181=5 Bom. L. R. 916.

as the condition on which he is entitled to recover the suit property from the defendant that he should refund Rs. 800 within two months after the record reaches the trial Court. The appeal is allowed and a decree will be issued in terms of our judgment. In the circumstances of the case there will be no order as to costs throughout.

Crump, J.—I agree.

Appeal allowed.

1925 BOMBAY 501

MACLEOD, C. J. AND COYAJEE, J.
Martand Trimbak Gadre—Appellant.

v.

Amritrao Raghojirao Damale—Respondent.

Second Appeal No. 368 of 1923, Decided on 25th March, 1925, from the decision of the Dt. J., Poona, in Appeal, No. 154, of 1920.

(a) *Dekkhan Agriculturists' Relief Act*—Privileges under the Act are personal—They cannot pass by assignment or devolution.

The privileges conferred upon an agriculturist by the Act are personal; they are not such as can pass from one person to another either by assignment or by devolution. They are limited to him in that special character; for example, when his right as mortgagor passed into non-agriculturist's hands, the special privilege previously annexed to the right perishes. [P. 502 C, 1]

(b) *Dekkhan Agriculturists' Relief Act*, S. 10 A—Section applies only when an agriculturist is party to suit.

To make S. 10 A applicable to a suit, an agriculturist must be a party to it. [P. 502 C, 1]

(c) *Evidence Act*, S. 92, proviso 1—Suit to invalidate document for fraud is different from one to declare that a document is not what it purports to be.

There is a great difference between a suit to invalidate a document on the grounds of fraud etc., mentioned in proviso 1 and a suit for a declaration that a document is not what it purports to be according to its plain grammatical meaning. [P. 503 C, 1]

(d) *Evidence Act*, S. 92 proviso 6—Circumstances surrounding a document may be proved only to make its meaning clear and not to prove it to be something else than what it purports to be—*Deed-Construction*.

The language of the proviso is rather vague. It is true that evidence of the circumstances, surrounding a document is admissible; but it is admissible only for the purpose of throwing light on its meaning. It would not be permissible to consider the surrounding circumstances with a view to holding that a document which on the face of it is a sale deed was inten-

ded to operate as a mortgage. There must be some limit to the suggestion that the surrounding circumstances can always be scrutinised so as to enable the Court to alter or change the nature of the document to something different from what it appears to be. Otherwise there could be no certainty as to the proper construction to be placed on a document which to all appearance is unambiguous. [P. 503 C, 1]

K. H. Kelkar—for Appellant.

G. N. Thakor and **J. G. Rele**—for Respondent.

Facts.—The original plaintiff Raghoji Yeshwantrao filed this suit in the year 1913 to redeem the land described in Schedule A to the plaint and to take possession thereof after taking accounts under the Dekkhan Agriculturists' Relief Act. His allegation was that the lands were mortgaged on June 9, 1885, to the defendants' father for Rs. 2,000 to Rs. 2,500 but the defendants' father took advantage of the weakness of the plaintiff's intellect and got a sale-deed from the plaintiff with regard to all his lands and Inami Haks agreeing to reconvey them when the amount due to him would be paid off. The defendant denied that the plaintiff was an agriculturist; an issue was raised whether the plaintiff was an agriculturist, and it was found in the affirmative. Before the hearing of the suit the plaintiff died and his son Amritrao was placed on the record as his legal representative. An issue was then raised whether Amritrao was an agriculturist in 1916-17 when he was joined as a party, and it was found that he was an agriculturist in 1913 but was not one in 1916-17. The Subordinate Judge then said:—"This finding does not affect the suit except in one fact, namely, it only excludes some oral evidence that could not have been led except under S. 10 A of the Dekkhan Agriculturists' Relief Act. The finding arrived at by me does not prevent the plaintiff from proving a mortgage under the provisions of S. 92 of the Indian Evidence Act." There was further delay owing to an allegation that there had been a compromise. The suit finally came on for hearing before Mr. Taskar, who held that the transaction dated January 9, was in the nature of a mortgage, that the consideration for the same was Rs. 1,300 principal and Rs. 200, interest on old debt; and that on taking accounts nothing was due to the mortgagee. He passed a decree in favour of the plaintiff that the defendant should hand over possession of

the lands in suit to the plaintiff free from the mortgage.

This finding was confirmed by the District Judge in appeal.

Macleod, C. J.—[After setting out the facts of the case as given above his Lordship continued:—] The first question is whether the present plaintiff who is not an agriculturist can take advantage of the fact that his father Raghoji who had filed the suit was an agriculturist. We are not aware of any direct authority on this question. But it seems clear that the privileges conferred upon an agriculturist by the Dekkhan Agriculturists' Relief Act are personal; they are not such as can pass from one person to another either by assignment or by devolution. They are limited to him in that special character. "When his right as mortgagor passes into non-agriculturist hands, the special privilege previously annexed to the right perishes." [*Amichand v. Kanhu* (1)].

S. 10 A of the Dekkhan Agriculturists' Relief Act is as follows:—"Whenever it is alleged at any stage of any suit or proceeding to which an agriculturist is a party that any transaction in issue entered into by such agriculturist or the person, if any, through whom he claims was a transaction of such a nature that the rights and liabilities of the parties thereunder are triable wholly or in part under this chapter, the Court shall, notwithstanding anything contained in S. 92 of the Indian Evidence Act, 1872, or in any other law for the time being in force, have power to inquire into and determine the real nature of such transaction and decide such suit or proceeding in accordance with such determination and shall be at liberty, notwithstanding anything contained in any law as aforesaid, to admit evidence of any oral agreement or statement with a view to such determination and decision; provided that such agriculturist or the person, if any, through whom he claims was an agriculturist at the time of such transaction." Therefore this condition must be fulfilled if S. 10 A of the Dekkhan Agriculturists' Relief Act is to be made applicable to a suit, *viz.*, that an agriculturist must be a party to it. When Raghoji died there was no longer an agriculturist party to the suit. Amritrao was not an agriculturist. He was brought on the

record in Raghoji's place, and S. 10 A could not be applied in his favour.

The suit was then continued by Amritrao as Raghoji's legal representative, and he claimed to have the issue tried whether the transaction dated January 9, 1885, was "in the nature of a mortgage." The Judge held that owing to the various facts surrounding the execution not only of the document in question (Exhibit 40) but also of two other documents (Exhibits 224 and 300) which were executed by Raghoji on the same day, the intention of the parties must have been to create a mortgage and not to effect a sale. Of the two documents, Exhibits 224 and 300, one evidenced a mortgage and the other a sale in respect of properties other than those included in Exhibit 40. The Judge held that all these three transactions were mortgages passed partly for past debts and partly for future advances; that the consideration for the suit transaction was Rs. 1,300 principal and Rs. 200 interest on old debt, and that on taking an account, nothing was due under the mortgage. He does not say which provisions of the Indian Evidence Act, he called in aid for this purpose. But he thought there was abundant circumstantial evidence which conclusively proved that the transaction in suit was really a mortgage though ostensibly a sale, and as the result of his findings he passed a decree directing the defendants to "hand over possession of the lands in suit to plaintiff free from the mortgage."

On appeal, the District Judge affirmed the decree. He said: "The document is in form a sale-deed; and the next question is whether S. 92 of the Indian Evidence Act would bar any inquiry into the nature of this transaction. In my opinion it would not. One of the allegations in this case is want of consideration. Under proviso 1 of S. 92 "any fact may be proved which would invalidate a document, such as fraud." Undoubtedly, fraud can be proved to invalidate a document. Under proviso 1 of S. 92 of the Indian Evidence Act, "Any fact may be proved which would invalidate any document, or which would entitle any person to any decree or order relating thereto; such as fraud, intimidation, illegality, want of due execution, want of capacity in any contracting party, want or failure of consideration, or mistake in fact or law." Apart from

(1) [1884] P. J. 203.

the question whether a suit to invalidate a document twenty-eight years after its execution on the grounds such as are mentioned in proviso 1 would not be barred by the law of limitation, there is, it may be remarked, a great difference between a suit to invalidate a document on one of the grounds mentioned in that proviso and a suit for a declaration that a document is not what it purports to be according to its plain grammatical meaning. But still the Judge proceeded to discuss the circumstantial evidence with regard to the transaction in order to satisfy himself that it was of the nature of a mortgage. Probably he had in mind proviso 6 to S. 92 also, which says: "Any fact may be proved, which shows in what manner the language of a document is related to existing facts." The language of the proviso is rather vague. It is true that evidence of the circumstances surrounding a document is admissible; but it is admissible only for the purpose of throwing light on its meaning. It would, we think, be not permissible to consider the surrounding circumstances with a view to holding that a document which on the face of it is a sale-deed was intended to operate as a mortgage. There must be some limit to the suggestion that the surrounding circumstances can always be scrutinised so as to enable the Court to alter or change the nature of a document to something different from what it appears to be. Otherwise there could be no certainty as to the proper construction to be placed on a document which to all appearance is unambiguous. It is obvious that by calling in aid the provisos to S. 92 of the Indian Evidence Act this case has been treated in both the lower Courts exactly in the same way as if the present plaintiff had been an agriculturist. Assuming that it might be possible, apart from any bar of limitation, for the party signing the sale-deed to be able to satisfy the Court on one ground or another, that the document was a mortgage, still the Court having found that the document was a mortgage, would have to stand by the terms of the document, and could not be allowed to go behind the transaction and take accounts as if the case had come under the Dekkhan, Agriculturists' Relief Act. That involves considerable confusion of thought; and, as is already pointed out, both the lower Courts have been led into

treating the present plaintiff as if he actually was an agriculturist. We think, for these reasons, that it was not open to him to ask the Court to hold that the sale-deed of 1885 was a mortgage.

In our opinion, therefore, when the original plaintiff died, the suit could only continue on the same basis, provided the legal representative was an agriculturist. But once it was proved that the present plaintiff was not an agriculturist the suit was bound to fail. The appeal is allowed and the plaintiff's suit dismissed.

The present appellant to have his costs in this Court, in the District Court, and the costs of the hearing before Mr. Taskar. All costs prior to that, subject to any order that may have been made with regard to particular costs, will be borne by each party.

Appeal allowed.

★ 1925 BOMBAY 503

MACLEOD, C. J., AND COYAJEE, J.

D. S. Apte—Plaintiff—Appellant.

v.

Tirmal Hanmant Savnur — Defendant—Respondent.

Second Appeal No. 357 of 1924, Decided on 3rd April 1925, from the decision of the Dt. J., Dharwar, in Appeal No. 20 of 1923.

★ *Civil P. C., S. 48 (1) (b)—Subsequent order means any order made by a competent Court—Order of executing Court allowing time for judgment-debtor to pay up the balance of decretal amount is a subsequent order and gives a fresh period for executing the decree.*

The words "any subsequent order" must not be limited as if the words "by the Court which passed the decree" were there, but mean any order made by a competent Court, and an order made by a Court executing a decree allowing a judgment-debtor time to pay up the balance of the decretal money by instalments is a subsequent order within the meaning of S. 48, and gives a fresh period to the decree-holder to execute his decree. 40 *All. 198 Dissented from.* [P 501 C 1 & 2]

S. B. Jathar—for Appellant.

R. A. Jahagirdhar—for Respondent.

Macleod, C. J.—In this case a decree was passed on May 28, 1903, in the Subordinate Judge's Court. The final decree was passed by the High Court on September 8, 1908. The plaintiff applied for

execution on December 21, 1921. The opponent against whom this proceeding was instituted contended that the property sought to be attached and sold was not liable for the decretal debt on the ground that it was in his possession as the grandson of the surety of the principal debtor. This contention found favour with the Subordinate Judge, and accordingly the application was dismissed.

The judgment-creditor appealed, and although no question of limitation was raised in the grounds of appeal, the question of limitation was raised at the commencement of the argument before the District Judge. The respondent argued that as between the date of the decree and the date of the last application more than twelve years had elapsed under S. 48 of the Civil Procedure Code there could be no further application. Now, on June 9, 1911, the Subordinate Judge made an order that the amount should be recovered by annual instalments of Rs. 125 each, the first instalment to become due on February 1, 1912. In case of default to pay any, the whole to be recovered at once. Each instalment to carry interest at six per cent. per annum. The District Judge, following the decision in *Jurawan v. Mahabir Dube* (1), held that as that order was made by the Subordinate Judge sitting as a Court of execution it was not an order within the meaning of that word in S. 48 (1) (b) of the Civil Procedure Code. In that case it was held that the expression "subsequent order" in S. 48 (1) (b) of the Code of Civil Procedure means a subsequent order made by the Court which made the decree and acting as that Court, and not an order of a Court executing the decree; that an order made by a Court executing a decree, allowing a judgment-debtor time to pay up the balance of the decretal money, would not be a subsequent order within the meaning of S. 48, and would not give a fresh period to the decree-holder to execute his decree nor was an order merely giving time for payment an order staying execution or an injunction, so that the time so given could be excluded in computing limitation against the decree-holder.

With great respect, I cannot see myself why the words "by the Court which passed the decree" were there. The words "any subsequent order" to my

mind," mean any order made by a competent Court. As the District Judge points out, any other construction would lead to this absurdity that there might be an order by a competent Court directing that the decree should be paid by instalments, with the result that when twelve years had expired some of the instalments might still remain to be paid, even if there had been no default on the part of the debtor. It would certainly be an extraordinary interpretation to put on those words which might result in a creditor being deprived of his right to execute for the subsequent instalments if they were not paid.

It is not suggested in this case that the order of June 9, 1911, was not made by a competent Court.

The present darkhast sets out the previous history of the decree. It recites the following order made in Darkhast No. 286 of 1908 :—

"The defendant No. 3 is examined. Having regard to all the circumstances I order that the amount should be recovered by annual instalments of Rs. 125 each. First due on February 1, 1912. In case of default to pay any, the whole to be recovered at once. Each instalment to carry interest at six per cent. per annum from this date of recovery to be recovered along with the instalment June 9, 1911."

I fail to see on what possible ground we could hold that that was not a subsequent order within the meaning of S. 48 (1) (b). I think that the District Judge had some excuse for following the decision in *Jurawan Pasi v. Mahabir Dhar Dube* (1) as there was no decision of this Court on the same point. We allow the appeal, set aside the order of the District Judge dismissing the appeal before him, as that appeal was dismissed on a preliminary point, which was raised neither in the trial Court nor in the grounds of first appeal, and remand the appeal for further hearing before the District Judge. The appellant will be entitled to his costs in this Court.

Coyajee, J.—I am of the same opinion.

Appeal allowed.

(1) [1918] 40 All. 198=44 I. C. 24=16 A. L. J. 71.

1925 BOMBAY 505

MACLEOD, C. J., AND COYAJEE, J.

Emperor—Appellant.

v.

Thakordas Motiram—Accused.

Criminal Appeal No. 646 of 1924, Decided on 15th April 1925, against an order of acquittal passed by the Bench of 3rd Class Magistrates, Rander.

(a) *Bombay Dt. Municipal Act (Bom. Act III of 1901), Ss. 96, 92 and 91(A)—Permission to build—Permission subject to keeping land within regular line of street unbuilt upon is legal—Building beyond the line is an offence.*

The Rander Municipality granted permission to the accused to build, subject to the condition that the house should be built after leaving open the land within the alignment of the road in front. The accused, in spite of the condition, built up his house within the alignment.

Held: that the accused had offended against S. 96 as amended in 1914; for he was bound to ask for permission to re-construct his building within the regular line of the street and the Municipality were entitled to issue such orders as they thought proper not inconsistent with the Act and to impose in writing such conditions with reference to the location of the building in relation to any street existing or projected as they thought proper. Under S. 92 certain powers are given to a Municipality, if any of the conditions mentioned therein exist, to require the owner by written notice to remove his building to the regular line of the street or the front of the adjoining building on either side. [P. 507, C. 1]

(b) *Interpretation of statutes—Where intention is plain Court cannot scan wisdom of legislature.*

When once the intention of the legislature is plain, it is not the province of a Court to scan its wisdom or its policy. Its duty is not to make the law reasonable, but to expound it as it stands according to the real sense of the words.

[P. 508, C. 2]

S. S. Patkar—for the Crown.

G. N. Thakor and R. J. Thakor (for M. K. Thakore)—for the Accused.

Macleod, C. J.—On June 28, 1923, a complaint was filed before the Honorary Special Bench Magistrates, Rander, by the Town Daroga of the Rander Municipality against two persons, Thakordas Motiram and Jamnadas Narandas.

The complaint stated that the house of accused No. 1 was situated at Tika 3, Survey No. 57A in the Parekh Moholla. Permission had been given to him to build the house on February 8, 1923, and the Rajachithi had been taken on his behalf by accused No. 2. It was mentioned in the Rajachithi that the house

was to be built after leaving open the land within the alignment. In spite of that, building within the alignment was commenced on March 4. Notice was sent to stop the work on March 7, but the building continued. On May 7, the Managing Committee passed a resolution ordering the complainant to institute criminal proceedings. The complaint was accordingly made under S. 96 of the Bombay District Municipal Act, and also under S. 153 as the accused refused to comply with the order in the notice sent to them.

The Magistrates by a majority acquitted the accused. They considered that the Rajachithi given by the Municipality was not in accordance with law, because the Municipality had no authority under S. 96 of the Act to take land, and could not pass orders to relinquish land. It had powers under S. 92 to order relinquishment, and under S. 91A to take steps; but in spite of that the Municipality had not exercised the provisions of those sections.

The Government of Bombay have appealed. On August 30, 1922, accused No. 1 sent Ex. 11 to the Secretary of the Municipality intimating that his house on Survey No. 57A, Tika 3, had to be demolished and he intended to build it anew. Permission was requested after whatever inquiry was to be made was over.

On September 6, accused No. 1 wrote that he did not intend to build at present. So he requested the Municipality to cancel his application. This was filed on September 11, 1922.

On January 29, 1923, accused No. 1 sent another application (Ex. 11) for permission to build his new house. It was placed before the Managing Committee on February 4, and on February 8 the Rajachithi was issued, Ex. 14. The accused No. 1 was informed that in accordance with the resolution passed by the Managing Committee the house on survey No. 57A, Tika 3, was within alignment, so he was permitted to build anew according to the measurement in the Sanad after leaving open land going within the alignment measuring 8 feet 10 inches at the northern end, 13 feet 7 inches at the southern end and 26 feet 4 inches long.

On March 7, 1923, a notice, Ex. 13, was sent to accused No. 2, as follows:

"There is the house on Survey No. 57 Tika 3, in Parekh Falia of the Town of Rander, belonging to Mr. Thakordas Motiram. The building work of that house is being done under your supervision. You have also received the Rajachithi on his behalf and signed in token of receipt. Though you were ordered to leave open the land coming within alignment, you have not left it open and against this permit you have commenced building work on the land coming within alignment. Therefore you are ordered by this notice that the building work which you have commenced in the land within alignment should be stopped at once. If you fail to stop it in compliance with the notice and continue further work legal steps will be taken to remove the work done without permission and in disobedience of the notice."

As no attention was paid to this notice the Managing Committee resolved on May 7, Exhibit 2, that a complaint should be lodged. In the meantime accused No. 1 had sent in an application dated March 16, that the resolution passed previously might be cancelled and the alignment changed. This was rejected on September 7, 1923. Another application was sent in, on March 29 by accused No. 2 on behalf of accused No. 1, that he might be allowed to finish the work, but no reply was sent to this.

Narharishankar Ramshankar deposed that he had done the work of the alignment fixed by the Municipality in the Parekh Moholla. The resolution to keep the road 30 feet wide was passed on July 7, 1921. Nagindas Vithaldas, who was Secretary to the Municipality in March 1923, deposed that land within the alignment had been built over.

There can be no doubt, therefore, that permission was given to accused No. 1 to build on certain conditions, one of which was that the land within the alignment should be left open and that in defiance of this condition building work was done on land within the alignment. It would certainly seem strange if the Municipality in such a case had no remedy. Counsel for respondent mainly relied upon the decision of this Court in *Bai Fatma v. Rander Municipality* (1). The plaintiff being the owner of a house in Rander applied to the Municipality for permission to rebuild. A permit was granted subject

to various conditions prescribed presumably under S. 96 (2) of the Act, one of which was as follows: "For the improvement of the said road you must leave on that side a space in length . . . and in width 14 feet." Scott, C. J., said (pp. 603-609):

"The power of the Municipality under the section to prescribe the location of the building is given in relation 'to any street existing or projected as they think proper.' They have prescribed the location of the building in relation not to the existing street, but to a street which may come into existence in the future. But we do not think that on the admitted facts it can be said that there is a projected street 14 feet in width, for there is no regular line determined either for the existing street or for the future as contemplated in S. 92. The permit clearly shows that the first condition is not for the purpose of sanitation or for the purpose of ventilation, but simply for the improvement of the street by widening it, and the object is to get a set-back which cannot be obtained under S. 92, because the conditions contemplated in that section do not yet exist. The result is that if the condition of the permit were complied with the plaintiff would have to give up or keep vacant and unproductive a considerable portion of her land, and the Municipality would have the opportunity of paying compensation for it at any time they might feel disposed to do so, which would be contrary to the provisions of S. 92, which contemplate that when a set-back is determined upon compensation shall be paid to the owner."

Accordingly plaintiff was granted the injunction she asked for.

It is important to note that there was no regular line of a public street determined upon in the locality where the plaintiff's house was situated. Nor could it be disputed that where the conditions contemplated in S. 92 existed, a Municipality could not get a set-back without paying compensation as provided for by sub-S. 3.

Thereafter a very important alteration in the law was effected by the addition of S. 91A to the Bombay District Municipal Act by Bombay Act VIII of 1914, which may very well have been enacted in order to obviate the inconvenience arising from a Municipality having to pay compensation for scattered set-backs within the

(1) [1914] 38 Bom. 597=25 I. C. 411=16 Bom. L.R. 529.

regular line of a street long before the street itself could be widened.

Sub-Section 1 makes it the duty of every Municipality to prescribe a line on each side of every public street within the Municipal district, and the Municipality may from time to time prescribe a fresh line in substitution for any line so prescribed, or for any part thereof, provided that public notice must be given and all objections considered within the time specified in the notice.

By sub-S. 2 the line for the time being so prescribed shall be called the regular line of the public street.

Then by sub-S. 3, except under the provisions of S. 113 (with which we are not now concerned), no person shall construct, or without the permission of the Municipality under S. 96 reconstruct, any portion of any building within the regular line of the public street, and by sub-S. 4 whoever contravenes the provisions of sub-S. 3 shall be punished with fine which may extend to Rs. 1,000 and the Municipality may (a) direct that the building be stopped, and (b) by written notice require such building or portion thereof to be altered or demolished as they may deem necessary.

It seems unfortunate that the proceedings were not taken against the accused under S. 91A instead of under S. 96. However that may be, by Act VIII of 1914 a consequential amendment was made to S. 96 adding the words "or is empowered by S. 91A to give permission to reconstruct."

The accused No. 1 was, therefore, bound to ask for permission under S. 96 to reconstruct his building within the regular line of the street and the Municipality were entitled to issue such orders as they thought proper not inconsistent with the Act, and to impose in writing such conditions with reference to the location of the building in relation to any street existing or projected as they thought proper. Any reference, therefore, to S. 92 is quite irrelevant, and the suggestion that the Municipality could not refuse permission to build within the regular line of the street without paying compensation cannot be sustained.

The scheme of S. 92 is quite different from that of S. 91A. There is no question of an owner applying for permission to build, but certain powers are given to

a Municipality, if any of the conditions mentioned therein exist, to require the owner by written notice to remove his building to the regular line of the street or the front of the adjoining building on either side.

The penalty for not complying with the orders of the Municipality issued under S. 96 is provided by sub-S. 5.

We are, therefore, of opinion that the Magistrates were wrong in acquitting the accused. We allow the appeal and record a conviction against both the accused under S. 96 (5). In the circumstances of the case we direct each of the accused to pay a fine of Rs. 50.

Coyajee, J.—I concur. The relevant provisions of the Bombay District Municipal Act, 1901, are Ss. 91A and 96; they fall under Chapter IX which deals with "Municipal powers and offences." Section 91A, which was inserted therein by Bombay Act VIII of 1914, casts upon every Municipality the duty to prescribe a line on each side of every public street within the Municipal district; it also empowers the Municipality to prescribe from time to time a fresh line in substitution for any line so prescribed or for any part thereof. These powers are subject to the conditions that, before prescribing such line or such fresh line, the Municipality shall give sufficient public notice of the proposal, and shall also consider any written objection or suggestion that may be offered in regard to such proposal. The line for the time being so prescribed is called "the regular line of the public street." Sub-section (3) then enacts that subject to the exception, with which we are not concerned, "no person shall construct, or without the permission of the Municipality under S. 96 reconstruct, any portion of any building within the regular line of the public street." Sub-section (4) imposes a penalty on persons contravening the provisions of Sub-sec. (3).

It appears from Exhibits 11 and 18 that Thakordas Motiram (accused No. 1) owned a house in Survey No. 57A, Tika 3, of Rander; he wanted to demolish it and erect a new building on its site. In August 1922, Jamnadas Narandas (accused No. 2) applied on his behalf to the Municipality for permission to reconstruct it. The application was withdrawn in September 1922, but renewed on

January 29, 1923. It was made in accordance with S. 96 of the Act. The material words of Sub-sec. (1) are: "Before beginning to erect any building . . . or to reconstruct any projecting portion of a building in respect of which the Municipality is empowered by . . . S. 91A to give permission to reconstruct it, the person intending to build . . . shall give to the Municipality notice thereof in writing." &c.; the explanation to the section defines the expression "to erect a building." The regular line of the public street where the house in question was situated was prescribed some time before August 1922. On February 8, 1923, the Municipality granted the Rajachithi, Ex. 14, in these terms: "You are informed that the house on Survey No. 57A, Tika 3, is within alignment. You are, therefore, permitted to build anew according to the measurements in the sanad, after leaving open land going within the alignment measuring feet 8-10 at the northern end and feet 13-7 at the southern end and feet 26-4 long, alongside the building as shown in the map. The permit has been given subject to the conditions on the back. Hereby permission to do anything else is not given." The first condition refers to what is already set out above. It was, in my opinion, competent to the Municipality to impose that condition under Sub-sec. (2) of S. 96 which says: "The Municipality may issue such orders not inconsistent with this Act as they think proper with reference to the work proposed in such notice and may either give permission to erect . . . the building according to the plan and information furnished or may impose in writing such conditions . . . with reference to the location of the building in relation to any street existing or projected, as they think proper," &c. The condition imposed by the Municipality had reference to the location of the building in question in relation to the street. The evidence adduced in this case, which is fully set out in the judgment of the learned Chief Justice, establishes the fact that the accused persons constructed a portion of the new building within the regular line of the public street in violation of the said condition and contrary to the legal orders of the Municipality issued under S. 96. They have, therefore, become liable to the penalty prescribed in Sub-sec. (5). The majority of the Bench of Magistrates

who tried the case are, however, of a different opinion. The Chairman says: "The Rajachithi given by the Municipality is not in conformity with law, because the Municipality has no authority under S. 97 of the District Municipal Act to take land and cannot pass orders to relinquish land. But it has powers to order relinquishment of land under S. 92 of the Bombay District Municipal Act, and is empowered under S. 91A to take steps. But in spite of this, it appears that the Municipality has not exercised provisions of these sections this time. If the Municipality wanted to order relinquishment of land coming within the alignment, then it should have taken steps according to law under S. 92 of the District Municipal Act after receipt of the application for the permission and before giving the permission." The opinion of another member, Mr. Chhotalal, is this: "The authority which the Municipality has to order the land coming within the alignment to be left open under S. 96 arises after giving its value in money or sanctioning such payment. Accordingly, if after giving the price of the land, the permission with the condition of leaving the land open was given, the accused No. 1 could have been judged to be guilty." The third member gave no opinion at all. I am unable to agree with the opinion of the majority. Apparently they felt that a plain reading of the relevant provisions of the Act might lead to some inconvenience, and therefore the provisions themselves were unreasonable; they would, then, read into those provisions the condition suggested by Mr. Chhotalal. The prohibitions of Sub-sec. (3) of S. 91A are, however, perfectly clear. They are not qualified by any such condition. The language used in Sub-secs. (1) and (2) of S. 96 also is—so far at any rate as this case is concerned—free from ambiguity. When once the intention of the legislature is plain, "it is not the province of a Court to scan its wisdom or its policy. Its duty is not to make the law reasonable, but to expound it as it stands, according to the real sense of the words." (Maxwell's "Interpretation of Statutes," 6th Edition, page 7). Section 92 of the Act deals with a different set of facts; it empowers the Municipality to enforce a removal or set back; and a reference to its provisions is therefore not relevant to the present inquiry.

For these reasons I agree in the order proposed by the learned Chief Justice.

Acquittal set aside.

★ 1925 BOMBAY 509

MACLEOD, C. J., AND COYAJEE, J.

Vishnu Moreswar Dabholkar and others—Defendants—Appellants.

v.

Sadashiv Shivram Nisale and others—Plaintiffs—Respondents.

First Appeal No. 205 of 1924, Decided on 23rd March 1925, from the decision of the First Class Sub-J., Ahmednagar, in Darkhast No. 703 of 1922.

Civil P. C., O. 23, R. 3—Mortgage suit compromised—Compromise allowing realisation from property other than mortgaged one—Compromise is lawful.

A compromise decree in a mortgage suit by which the parties agree that the amount decreed according to the compromise should be a charge on certain properties, in addition to the mortgaged property, is "lawful" and "relates to the suit," within Rule 3 so as to be embodied in the decree. 30 *Mad.* 478 *Foll.*

[P 503 C 2, P 510 C 1]

*B. K. Dhurandhar and V. D. Limaye—*for Appellants.

*G. N. Thirkor and J. G. Rele—*for Respondent No. 1.

Macleod, C. J.—In Suit No. 333 of 1920 in the Court of the First Class Subordinate Judge at Ahmednagar, a compromise decree was passed in which it was directed that a sum of over Rupees 32,000 with interest should be paid by annual instalments of Rs. 5,000 a year. Clause 7 was as follows:

"In default of payment of any two instalments the plaintiff should treat that the concession regarding the instalments that were allowed was not availed of and should forthwith recover the whole amount due to him at that time including principal and interest by sale of the mortgaged property in suit and of the below-mentioned property given as security and mentioned in clause 8 through Court."

Clause 8 was as follows:

"As the value of the property given as security and mentioned in the mortgage deed is not sufficient to pay off the whole amount due by the defendants, the same, together with the immoveable property of the defendants situate at Mauje Khedle Parmanand in the taluka of Nevase have been given as security for the whole of this amount."

As the defendants did not pay the instalments as directed by the decree, the plaintiff took out a darkhast, and as is not uncommon in such cases, the defendants raised all sorts of technical objections to their being compelled to pay what they had agreed to be ordered to pay under the compromise decree. They contended that the decree could not be executed unless a final decree was passed. They also contended that the property referred to in clause 8 of the decree could not be sold at all in execution of the decree. We see no reason why we should consider that the decree was a preliminary decree which could not be executed unless a final decree was passed. It was a decree for a specific sum payable by instalments with a direction that if two instalments fell into arrears, the plaintiff could sell the mortgaged property. If it had been intended that the decree should be considered as a preliminary decree, then a direction would have been given that on default the plaintiff should be at liberty to apply for final decree. But in the absence of such a direction, there would be nothing to prevent the plaintiff, when the defendants fell into arrears, making an application to execute the decree by sale of the mortgaged property under clause 7 of the decree.

It was then contended that because the property referred to in clause 8 was not the subject matter of the suit as originally filed, the plaintiff could not ask the Court to sell it in execution, but must file another suit for a declaration, presumably that that property was charged with payment of the decretal amount. The Privy Council decision in *Hemanta Kumari Dabi v. Midnapur Zamindari Company* (1) was relied upon. In that case there was a compromise, one of the terms of which was that plaintiff agreed that if she succeeded in another suit which she had brought to recover certain land, other than that to which the compromise suit related, she would grant to the defendants a lease of that land upon specified terms. A suit was brought for the specific performance of the agreement. The chief objection to the claim was that the agreement required registration. The case was decided under S. 375 of the

(1) [1919] 45 I. A. 240=22 *Bom. L. R.* 485=24 *C. W. N.* 177=37 *M. L. J.* 525=17 *A. L. J.* 1117=(1920) *M. W. N.* 63=58 *I. O.* 534=27 *M. L. T.* 42=11 *L. W.* 801 (P. C.).

Code of 1882. The appellants rely upon a passage in the judgment at p. 246. Their lordships said :

"The terms of this section need careful scrutiny. In the first place, it is plain that the agreement or compromise, in whole and not in part, is to be recorded, and the decree is then to confine its operation to so much of the subject-matter of the suit as is dealt with by the agreement. Their Lordships are not aware of the exact system by which documents are recorded in the Courts in India, but a perfectly proper and effectual method of carrying out the terms of this section would be for the decree to recite the whole of the agreement and then to conclude with an order relative to that part that was the subject of the suit, or it could introduce the agreement in a schedule to the decree ; but in either case, although the operative part of the decree would be properly confined to the actual subject-matter of the then existing litigation, the decree taken as a whole would include the agreement. This, in fact, is what the decree did in the present case. It may be that as a decree it was incapable of being executed outside the lands of the suit, but that does not prevent it being received in evidence of its contents."

The question whether such an agreement with regard to property relates to the suit was considered in *Joti Kuruvetappa v. Izari Sirusappa* (2) where it was held that : "In a suit for money, where the plaintiff prays for a simple money decree, an agreement, by which the parties agree that the amount decreed according to the compromise should be a charge on certain properties, is 'lawful' and 'relates to the suit' so as to be embodied in the decree."

That case has been followed in various later decisions in Madras which are cited in Mulla's Civil Procedure Code at p. 687. We think, then, that the contention that the Court was not entitled to direct the sale of the property mentioned in clause 8 of the compromise decree cannot be sustained. There can be no doubt, when the compromise decree was passed, the defendants agreed that this property should be charged in the decree with payment of the decretal amount, and it is not very creditable to them that they

should now seek to prevent plaintiff's realising his security by suggesting that what was intended when the decree was passed should not be given effect to now, but that the plaintiff ought to be put to filing yet another suit.

We dismiss the appeal with costs payable to respondent No. 1.

Coyajee, J.—I agree. This appeal arises out of proceedings to carry out the decree passed in Suit No. 333 of 1920. It was a suit brought to enforce a mortgage, and praying *inter alia* for the sale of the mortgaged properties. The Court passed a decree with the consent of parties and in accordance with an agreement whereby the suit was wholly adjusted. The decree provided that the decretal sum should be paid by the judgment-debtors (now appellants) by instalments of Rs. 5,000 a year ; but in default of payment of two instalments the decree-holder was entitled to recover the whole amount then remaining due by sale of the properties referred to in clauses 7 and 8. This decree is not in the ordinary form of a mortgage decree (Order 34, Rule 4); and it is competent to the decree-holder to bring the said properties to sale in execution of the decree without applying that it may be made final.

It was then contended, on behalf of the judgment-debtors, that inasmuch as the decree-holder had claimed no relief in his plaint as regards the properties referred to in clause 8 of the compromise-decree, those properties could not be sold in execution of that decree. The scheme of the agreement arrived at between the parties was this : the creditor agreed to allow the debtor time for payment of the sum due by instalments. But as the value of the property originally mortgaged was insufficient to pay off the whole debt the debtor on his part agreed that the additional properties referred to in the eighth clause should be charged with payment of the decretal debt. The charge thus created was clearly a necessary part of the agreement whereby the suit was adjusted. The decree now sought to be executed was passed in accordance with that agreement. The question is whether that agreement "relates to the suit," as required by Order 20, Rule 3. There is nothing in the language of that enactment to restrict its operation to the relief claimed in the plaint. In *Joti*

(2) [1907] 30 Mad. 478=16 M. L. J. 354.

Kuruvetappa v. Iziri Sirusappa (2) the learned Judges say (p. 480) :

"We see nothing in this language to preclude the Court from embodying in the decree the charge which the parties agreed to as security for the debt. The agreement was 'lawful,' and it 'relates to the suit,' that is, to the matter of the claim in the case. In the claim as made in the plaint there was, it is true, no prayer to have the amount charged on the property' but there is nothing in principle or in the language of section...to restrict the relief to be granted in accordance with a compromise to what is prayed for in the plaint or less...the language used is wide and general, and it is obvious that it would be highly inconvenient if the parties should not be allowed to settle their disputes on such lawful terms as they might agree to without being restricted to such relief as one only of the parties had chosen to claim in the plaint."

In that case the learned Judges were considering the language of S. 375 of the Code of 1882 ; but the omission of the last thirty words in the corresponding provision in the Code of 1908 does not affect the soundness of their view, with which I agree. On the facts of this case I am of the opinion that the decree now sought to be enforced was passed in accordance with the agreement of the parties which wholly adjusted the suit, and that the agreement did "relate to the suit." For these reasons this appeal fails.

Appeal dismissed.

★ 1925 BOMBAY 511

MACLEOD, C. J. AND COYAJEE, J.

Jivanchand Gambhirmal—Appellants.

v.

Laxminarayan Ganeshram—Respondents.

Second Appeal No. 649 of 1923, Decided on 20th March 1925.

★ *Contract Act, S. 30—Agreement to pay differences—Settlement by cross contract—Agreement of wagering nature within Bombay Act III of 1865, Sec. 1, though not under Contract Act, S. 30.*

A contract for forward delivery wherein neither party intends to give or take delivery and differences only are to be paid or received according to the market rate on the due date, and which is settled by a cross-contract is a wagering contract within S. 1 of Bombay Act III of 1865, though not under S. 30 of the Contract Act. [P 512 O 1]

K. H. Kelkar—for Appellant.

P. B. Shingne—for Respondent.

Macleod, C. J.—The plaintiff sued to recover Rs. 756-3-0 and costs of the suit alleging that the defendant agreed to pur-

chase from plaintiffs five bales of Fancy Border Dhoties of Amalner Mill weighing 1250 lbs. at the rate of Rs. 2-12-9 per lb., that the delivery was to be made on November 18, 1918, that the market rate of the said goods began to decrease, that the defendant fearing a steady fall in the rate and consequent loss therefrom agreed to sell the goods to plaintiffs at the rate of Rs. 2-1-3 per lb. and that plaintiffs thus stood to gain a profit of Rs. 742-3-0 in the bargain, and that the payment of the said profit amount by the defendant to plaintiff became due on November 18, 1918, the due date for delivery.

The defendant admitted the agreements in suit but contended that no actual delivery of the goods was intended on either side, that the agreements were by way of wager and were illegal and void.

The trial Court found that the transactions in suit were wagering transactions and dismissed the suit. The District Judge came to the conclusion that the original contract by the plaintiff to deliver five bales to the defendant was a wagering contract, that there was no intention on either side to give or take delivery and therefore agreed with the judgment of the Court below dismissing the plaintiffs' suit.

The learned Judge does not seem to have considered the point whether the agreement whereby the goods were sold back to the plaintiffs was also a wagering contract. The plaintiffs sought to avoid the consequences of S. 30 of the Indian Contract Act by stating that the cause of action was a claim for a specific amount of money agreed upon before the due date between the parties as the profit due to the plaintiffs on the original transaction. Although there must be a very large number of cases between merchants and others in which forward transactions are settled and differences paid according to such settlement, there does not appear to have been any case reported in which the defendant has disputed his liability to pay the amount settled by a cross-contract on the ground that both transactions came within S. 30 of the Indian Contract Act. It seems to us, even if it can be said, as in this case that the plaintiff and defendant agreed when the settlement of the contract for sale was entered into, that differences would be paid on the due date as profits to the plaintiffs on that contract, so that such an agreement

would not come within S. 30 of the Indian Contract Act, it would certainly come within the provisions of S. 1 of Bombay Act III of 1865. The real nature of the transaction was as follows: the plaintiff sold five bales to the defendant for forward delivery. At the time of the contract it was not intended by either party that delivery should be given by the plaintiffs and taken by the defendant. It was the intention that differences only should be paid or received according to the market rate at the due date. That contract then was a wagering contract. Before the due date arrived the defendant perceived that the price of the goods was rapidly falling and he thought it advisable to sell the goods back to the plaintiffs at the rate then prevailing. The only result was that the loss on the original contract was fixed as from that date instead of remaining uncertain till the due date arrived. There was then an agreement to pay differences arising out of the original wagering contract. S. 1 of Bombay Act III of 1865 is as follows:

"All contracts, whether by speaking, writing or otherwise, knowingly made to further or assist the entering into, effecting or carrying out agreements by way of gaming or wagering, and all contracts by way of security or guarantee for the performance of such agreements or contracts, shall be null and void: and no suit shall be allowed in any Court of Justice for recovering any sum of money paid or payable in respect of any such contract or contracts, or any such agreement or agreements as aforesaid."

The defendant then agreed by the second contract to pay the plaintiffs a certain sum as the plaintiffs' profit on the wagering contract and that clearly comes within that section. We think then that the plaintiff's suit was rightly dismissed and this appeal should be dismissed with costs.

Appeal dismissed.

★ 1925 BOMBAY 512

MACLEOD, C. J. AND COYAJEE, J.

Ramsing Harising—Plaintiff—Appellant.

v.

Bai Dyanba—Defendant—Respondent.

Second Appeal No. 826 of 1923, Decided on 29th January 1925, from the decision of the District Judge, Broach, in appeal No. 56 of 1922.

★ *Transfer of Property Act*, (4 of 1882), S. 127—*Execution of rent note by tenant—Possession not given to tenant—No transfer of property is effected thereby.*

The mere execution of a rent-note, unaccompanied by transfer of possession, does not transfer interest in the property. 35 *Mad.* 95 (F. B.) *Diss.*

K. N. Koyajee—for Appellant.

H. V. Divatia—for Respondent.

Macleod, C. J.—This suit was brought by the plaintiff for possession of certain lands alleging that he was a permanent tenant thereof under the lease dated July 1, 1912. The document is a rent-note and by itself does not purport to transfer an interest in the land, so that the execution of the rent note by the plaintiff to the owner of the land could not be said to constitute the transfer of any interest to him. Then if it had been accepted by the present defendant as alleged, as no possession had been given under it to the plaintiff, it would still remain a contract between the parties, so that the plaintiff would have to file a suit within three years from the time when the plaintiff had notice that performance was refused, for the performance of the contract. After the arguments were closed we were referred to the decision in *Ajam Sahib v. Meenatchi Devasthanam*, (1) in which it was held that the registered instrument which under S. 105 of the Transfer of Property Act is necessary to create a lease within the section need not necessarily be an instrument signed by the lessor. Such a lease might be created by the registered instrument signed by the lessee and accepted by the lessor. With all due respect I cannot think that the document in this case can operate as a transfer of an interest in the property to the lessee. It would have been otherwise if the lessee had obtained possession, such possession would then be attributable to the document he had signed, which had been registered and accepted by the lessor, so that in equity he would be entitled to retain his possession against the owner seeking to eject him. The plaintiff not having obtained possession has not, in my opinion, such a title as would support a suit for possession. This appeal, therefore, must be dismissed with costs.

Coyajee, J.—I agree.

Appeal dismissed.

(1) [1910] 33 *Mad.* 25=21 *M. L. J.* 202=
[1910] *M. W. N.* 166=8 *I. C.* 668=8
M. L. T. 437 (F. B.)

1925 BOMBAY 513

MACLEOD, C. J. AND COYAJEE, J.

Motilal Gopaldas Shet—Applicant.

v.

Krishnabai Gopalrao Garud—Opponent.

Civil Extraordinary Application No. 32 of 1924, Decided on 2nd July 1925, against the decree of the First Class Sub. J., Dhulia, in Small Cause Suit No. 749 of 1922.

Bombay Pleaders Act (17 of 1921), Ss. 17 to 19—No special agreement between pleader and client—Pleader dying before final decree—Proportionate fees on basis of quantum meruit only can be claimed—Legal Practitioner.

In the absence of any special agreement, a pleader shall be entitled to receive fees allowed on taxation between himself and his client for his services until the final decree or order in the proceeding is passed. If a pleader dies before such final decree or order is passed or for any reason the engagement of his services by his client is put an end to, then the pleader will only be entitled to ask the Court to award him certain proportionate fees on the basis of a *quantum meruit*. 12 Bom. 557, *Ref.*

The Court in assessing the *quantum meruit* might be guided by the percentages laid down by law for the regulation of costs between party and party, but is not bound to adopt that guide where circumstances of the case would render it unjust to do so. [P 513 C 2 ; P 514 C 1]

M. V. Bhat—for Applicant.

P. B. Shingne—for Opponent.

Macleod, C. J.—This suit was filed by the adopted son of the late Mr. Gopal Balvant Garud to recover certain fees due to his father, who carried on the profession of a pleader. The original plaintiff having died, the suit was continued by his mother. In the present application we are only concerned with an item of Rs. 109 debited in Mr. Garud's account on June 16, 1920, for his fees in Appeal No. 103 of 1920. The defendant admitted that he had engaged Mr. Garud in that appeal to appear for him, and that he had put in his *vakilpatra* in that appeal, but defendant denies his liability to pay Rs. 109 as Mr. Garud died before conducting the appeal. The Judge said :

"This contention is obviously not tenable. Having made his appearance for the defendant in the appeal, Mr. Garud was entitled to get his legal fees. It was no fault of his that he died before the appeal was heard, and the defendant cannot escape from that liability simply because

he had to incur further expense by engaging another pleader."

That finding could only be correct if it could be said that a pleader as soon as he has been retained, and has filed his *vakilpatra*, becomes thereby entitled to recover the whole of his fees which are payable for his services until the final decree is passed. There is no support for such a proposition in the Bombay Pleaders Act.

Under S. 17 of the Act :

"Any party employing a pleader may settle with him by private agreement the terms of his engagement and the fee to be paid to him for his professional services."

It is not suggested in this case that the defendant entered into any private agreement with Mr. Garud.

By S. 19, sub-S. (2) :

"Where no fee has been settled under S. 17, the pleader shall be entitled to receive from his client a fee computed in accordance with the rules in Schedule III, and any further fees which may be allowed on taxation between pleader and client in pursuance of any rules made in this behalf by the High Court."

Under Sub-S. (3) :

"The fee which a pleader is entitled to receive from his client when computed in accordance with the rules in Schedule III, and except when otherwise agreed between the pleader and the client, the fee which a pleader is entitled to receive under Sub-S. (1), is payable in respect of the pleader's services until the final decree or order in the proceeding is passed."

In the absence then of any special agreement, a pleader shall be entitled to receive fees allowed on taxation between himself and his client for his services until the final decree or order in the proceeding is passed. If a pleader dies before such final decree or order is passed, or for any reason the engagement of his services by his client is put an end to, then the pleader will only be entitled to ask the Court to award him certain proportionate fees on the basis of a *quantum meruit*.

In *Keshav Govind Joshi v. Jamsetji Cursetji* (1), the plaintiff was a pleader who had appeared for the defendant in certain proceedings up to a certain stage. Not being paid any fees for his services, he sued the defendant. It was held by the High Court that the pleader, in the

(1) [1888] 12 Bom. 557.

absence of an agreement, was entitled to a *quantum meruit*. The Court in assessing the *quantum meruit* might be guided by the percentages laid down by law for the regulation of costs between party and party, but was not bound to adopt that guide where circumstances of the case would render it unjust to do so.

The question is then what is the proper remuneration in the circumstances of the case, which would have been paid to Mr. Garud, if the engagement of his services had terminated without his doing anything further than what was done in this case, namely, the filing of the vakil-patra and entering the appearance of his client in the appeal. It is not suggested that Mr. Garud did anything more than that, as the appeal was not ready for hearing and did not come on for hearing till four months later. We think that on a *quantum meruit* the sum of Rs. 10 would be sufficient remuneration for such services. The order of the Subordinate Judge then must be amended by allowing the plaintiff with regard to that item of Rs. 109, Rs. 10 only. The applicant will be entitled now to the costs of the rule.

Order amended.

★ 1925 BOMBAY 514

MACLEOD, C. J., AND COYAJEE, J.

Vishvanathbhat Annabhat Pujari — Plaintiff—Appellant.

v.

Mallappa Ningappa and others—Defendants—Respondents.

Second Appeal No. 220 of 1924, Decided on 19th June 1925, from the decision of the Assistant Judge at Dharwar, in Appeal No. 71 of 1921.

★(a) *Registration Act, S. 28—Property included in a deed only to give jurisdiction to Sub-Registrar—Deed registered—Intention of parties to reconvey the property after registration does not invalidate registration.*

Where it was alleged that certain land was inserted in a deed merely for the purpose of giving jurisdiction to the Sub-Registrar, the intention of the parties being that the land should be reconveyed to the vendor.

Held: the Registrar had jurisdiction to register that document, because a portion of the property mentioned in the deed was within his jurisdiction, and evidence cannot be led with regard to the intention of the parties at the time the document was registered, to deal again with the

portion of the property which was within the jurisdiction of the Registrar and which rendered its registration valid. [P 514 C 2, P 515 C 1]

(b) *Hindu Law—Alienation—Minor—Alienation by mother to pay prior mortgage—Purchaser is not bound to see that money was properly disposed of.*

Where it was found that the mother of a minor sold minor's property in order to pay off a mortgage, and it was desirable in the interests of the minor that the mortgage should be paid off, as the profits of the land mortgaged were more than the interest on the mortgage, but it was contended that the payment made by mother to the mortgagee was excessive.

Held: even though the mortgagee was paid in excess, that would not affect the position of a bona fide purchaser for value. It would be sufficient for him to enquire whether there was as a matter of fact a mortgage to be paid off. He would not be bound to follow the purchase money, and ascertain that it was properly disposed of by the plaintiff's guardian. [P 515 C 2]

S. R. Purulekar—for Appellant.

Nilkant Atmaram—for Respondents.

Macleod, C. J.—This is an appeal from the decision of the Assistant Judge of Dharwar, who, reversing the decree of the trial Court, dismissed the plaintiff's suit with costs throughout. The suit was one to recover possession of the plaintiff land with costs and future mesne profits, on the ground that the plaintiff land belonged to the plaintiff. His mother during his minority, purporting to act as his guardian had sold the land to one Ningappa, the deceased father of defendants, on August 2, 1905. The sale was sought to be set aside on three grounds : (1) that the sale-deed was a fraud on registration; (2) that the sale was not for the benefit of the plaintiffs ; and (3) that the sale was of the nature of a mortgage and the amount of consideration had already been paid off from the profits of the land.

The fraud on registration set up by the plaintiff is based on the fact that only a portion of the land in the sale-deed was within the jurisdiction of the Sub-Registrar of Navalgund, who registered the sale deed and it is alleged that land was inserted in the deed merely for the purpose of giving jurisdiction to the Sub-Registrar, the intention of the parties being that that land should be reconveyed to the vendor. The Judge in the trial Court said :

" The circumstances, in which the two sale-deeds seem to have been passed lend support to the allegation that the insertion of the plot of ground in the sale-deed now

in suit was merely with a view to give jurisdiction to the Sub-Registrar of Navalgund to register the deed. Besides Chidambar Bhat, who is examined by the defendants, swears that the object of the insertion of the plot in the deed was merely to give jurisdiction to the Sub-Registrar of Navalgund, and that the parties to the sale deed in suit had no intention to alienate the said plot by the deed, and that the sale to him by Ningappa of the plot was benami for Bhagirathibai."

Exhibit 84 is the deed which transferred the plot to Chidambarbhat, the benami-dar for plaintiff's mother.

The appellant relies for his argument, that there was a fraud on registration, on two cases: *Harendra Lal Roy Chowdhuri v. Haridasi Debi* (1), in which it was held that one of the properties, appearing in the document to be registered was within the jurisdiction of the Registrar, and, therefore, registration was invalid; and *Biswanath Prashad v. Chandra Narayan Chowdhuri* (2), in which it was proved that the transferrer had no title to the property mentioned in the transfer-deed which would bring it within the jurisdiction of the Registrar. Neither of those cases is applicable to the facts in the present case. But appellant wishes us to extend those decisions to the facts before us. We are concerned at present with the registration of the sale-deed. The Registrar had jurisdiction to register that document, because a portion of the property mentioned in the deed was within his jurisdiction. Clearly, if no property belonging to the transferrer appearing in the document to be registered is within the jurisdiction of the Registrar, registration by such Registrar of that document would be invalid. But we are not prepared to go further and say that evidence can be led with regard to the intention of the parties at the time the principal document was registered, to deal again with the portion of the property which was within the jurisdiction of the Registrar and which rendered its registration valid.

The next question is whether the sale was for the benefit of the plaintiff. It

has been found that the plaintiff's mother sold the property in order to pay off a mortgage and, from the facts found, it was certainly desirable in the interests of the plaintiff that the mortgage should be paid off, as the profits of the land mortgaged were more than the interest on the mortgage, provided they could be realized.

The appellant, however, objects to the payment made by his mother as being excessive. There is no evidence that it was excessive, as the appellant took no steps to prove that on a proper mortgage account being taken, the amount paid by the plaintiff's mother was too much. Evidence was called to show that certain tenants had paid full rent to the mortgagee between 1902 and 1905. As the Judge remarks, they could not produce the receipts of such payment. However that may be, the onus would certainly lie on the appellant, if he seeks to dispute his mother's action, to prove that she had over-paid the mortgagee. But even then that would not affect the position of a bona fide purchaser for value. It would be sufficient for him to inquire whether there was as a matter of fact a mortgage to be paid off. He would not be bound to follow the purchase money, and ascertain that it was properly disposed of by the plaintiff's guardian.

The last point urged by the plaintiff was that the sale by his mother was of the nature of a mortgage. That question was ruled out by the trial Judge on the ground that the Dekkhan Agriculturists' Relief Act did not apply at the date of the sale deed, relying on the decision in *Chanbasayya v. Chennapgavda* (3). Since the decision of the appellate Court in this case, the decision in *Chanbasayya v. Chennapgavda* (3) was over-ruled by a decision of the Full Bench. Therefore, there was no objection to the plaintiff's contention that he should be allowed to prove that the sale was in reality a mortgage transaction between his mother and the purchaser if the suit was one in which the question could be raised. But this is not a suit for redemption. This is a suit to set aside a sale-deed. Therefore this is not a suit falling within the class of suits specified in the Dekkhan Agriculturists' Relief Act, and the plaintiff is not entitled to take advantage of its provisions. As pointed out in *Mt. Bachi*

(1) [1914] 41 Cal. 972=41 I. A. 910=1 L. W. 1050=27 M. L. J. 80=(1914) M. W. N. 462=16 M. L. T. 6=19 C. W. N. 817=19 O. L. J. 484=16 Bom. L. R. 400=23 I. C. 687=12 A. L. J. 774 (P. O.).

(2) [1921] 48 Cal. 509=48 I. A. 127=63 I. C. 770,

(3) [1919] 44 Bom. 217=54 I. C. 698=22 Bom. L. R. 44.

v. *Bickchand* (4) the Dekkhan Agriculturists' Relief Act gives extraordinary reliefs in certain cases which are specified in the Act. These include a suit for redemption. As this is not a suit for redemption, any relief granted by the Act is not open to the plaintiff. The appeal, therefore, fails and must be dismissed with costs.

Appeal dismissed.

(4) [1910] 13 Bom. L. R. 56=13 C. L. J. 69=8 A. L. J. 105=9 M. L. T. 199=15 C. W. N. 297=21 M. L. J. 89=9 I. C. 333=(1911) 2 M. W. N. 59 (P. C.).

1925 BOMBAY 516

SHAH, J.

Kishoredas P. Mangaldas—Plaintiff.

v.

Ahmed Suleman—Defendant.

O. C. J. Suit No. 635 of 1925, Decided on 17th April 1925.

Bombay Rent (War Restrictions) Act, (Bom. Act 2 of 1918)—Notice to quit given while the Act is in force—Fresh notice is not necessary after the Act ceases to apply.

The mere fact that the tenant is entitled to retain possession while the Act remains in force is not sufficient to create any relationship of landlord and tenant between the parties as would require a fresh notice to terminate it. The right to have notice is a statutory right the limits of which are to be found in the terms of the statute; and the moment the statute ceases to extend that protection to him he ceases to have the protection as against the landlord which the statute gave him up to a certain period. Where a landlord has, during the continuance of the Act given a notice to his tenant asking him to quit certain premises which he was using as business premises, it is not necessary for the landlord to give the tenant a fresh notice to quit after the Rent Act has ceased to apply to the premises. [P 517, C 2; P 518, C 2]

Kanga and Chimanlal Setalvad—for Plaintiff.

Kemp—for Defendant.

Shah, J.—This is one of the three suits in which the question arises as to whether after the Bombay Rent (War Restrictions) Act, II of 1918, has ceased to apply to a particular set of premises, the tenant is entitled to a fresh notice to terminate the tenancy even though a notice terminating the tenancy has been given by the landlord during the time when the Act was in operation. This particular suit has been fully heard and the parties have adduced evidence on all the

points. At the instance of the learned counsel for the defendants in the other two suits I have heard the parties in those suits also on the question of notice, which is common to all these three suits. But in dealing with the point I shall refer only to the facts of this case. The plaintiff sued to recover possession of a certain shop, which is described as Shop No. 3, situated at the junction of Shaikh Memon Street and Janjirkar Street and which is one of a group of shops known as Green Market. The defendant was a monthly tenant on the basis of a lunar month. In 1918 he used to pay Rs. 120 as rent, but after the Rent Act came into force he paid at Rs. 72-6-0 per month as standard rent. On July 29, 1924, the plaintiff gave one month's notice calling upon the defendant to vacate the premises on Shravan Vad 30th, Samvat 1980, corresponding with August 30, 1924. The premises in question were used for the purposes of business and not as a dwelling house, and the protection which the tenant had under the Rent Act terminated on August 31, 1924. There was some correspondence between the parties which commenced in January 1925. In the course of that correspondence the plaintiff stated that he would charge Rs. 200 per month for the period during which the defendant was wrongfully holding over. The defendant offered to pay sixty per cent. over and above the standard rent, which would be nearly the rent which he was paying before the Rent Act came into force, i. e., nearly Rs. 120. But the plaintiff did not accept the defendant's offer, and insisted upon his paying Rs. 200 per month if he wanted to continue as a tenant. He filed the present suit on March 3, 1925, to recover possession on the basis that the tenancy had been duly terminated by the notice of July 29 and claiming compensation for the period during which the tenant held over after the period of the notice at the rate of Rs. 200 per month.

The principal defence is that the notice of July 29 is ineffective because the defendant remained in possession according to law after August 30 under the provisions of the statute at least for one day. That gave him, it is contended, the position of a tenant according to the Act and as no notice terminating that tenancy was given, there was no effectual termination of the tenancy. It is also contended

that the amount claimed by the plaintiff is too high under the circumstances if the notice is found to be effective.

I shall first deal with the question which relates to the notice. Though the question has been argued at some length it seems to me that the point is very narrow. Apart from the provisions of the Bombay Rent Act (II of 1918) it is clear that the defendant was a monthly tenant of the plaintiff and his predecessor-in-title, and it was open to the plaintiff to terminate that tenancy by one month's notice according to the lunar month. The notice given is clearly one month's notice. Apart from the provisions of the Rent Act it is not disputed, and it cannot be disputed, that the notice is a perfectly good notice to terminate the monthly tenancy which existed between the parties. It is urged, however, that under the provisions of S. 9 of the Rent Act, so long as the defendant pays or is ready and willing to pay rent to the full extent allowable by the Act and performs the conditions of the tenancy, he is a tenant in spite of the notice to terminate the tenancy. No doubt the word 'tenant' is used in S. 9 of the Act; and it is contended that as a result of that provision his position on August 31 was that of a tenant of the defendant and that in spite of the notice the original tenancy continued under the statute which required a further notice to terminate it after the provisions of the Act ceased to apply after August 31. It seems to me that this contention is not sound. Apart from the statute the tenancy is a matter of contract between the plaintiff and the defendant and in spite of the statute it is perfectly open to the landlord to give a proper notice terminating that tenancy. It is equally clear that under the provisions of the Act in spite of the termination of such tenancy the tenant can continue in possession. No order for the recovery of possession of the premises can be made against the tenant so long as he pays or is ready and willing to pay rent to the extent allowable by the Act. In the view I take of the case, this would mean that on August 31 no order for the recovery of possession of these premises could be made against him if he was willing to pay the standard rent on that day. But when the provisions of the Act ceased to apply after August 31, 1924, there was in fact

no tenancy to terminate. After August 30, on which the contractual tenancy terminated, he could remain in possession only under the provisions of the statute which gave him the right to remain in possession subject to the conditions as to payment of rent and other conditions with which we are not concerned. But the moment the statute ceased to have operation in his favour his position with reference to the premises is that of a tenant holding over, whose tenancy has been terminated. On a consideration of all the arguments urged on both sides, I have come to this conclusion and I have stated the view which I take of the legal position of the defendant after the notice was given and after he ceased to have the benefit of the Rent Act. It has been urged that as the word 'tenant' is used in Sub-S. (1) of S. 9, the legislature has given him the position of a tenant during the period in which the Act is in force and he is entitled to all the rights and remedies which a tenant would have against the landlord as if he was a monthly tenant under a contract with his landlord. I am unable to accept this contention and I do not see how the mere use of the word 'tenant' in S. 9 can justify this position.

Certain English decisions have been referred to in the argument before me and I shall refer only to two of them to show that the view taken by the English Courts on this point is not that the tenant, or the statutory tenant as he is called, is in the position of a tenant apart from the statute, but that his rights and remedies, such as they are, are determined by the provisions of the statute. In *Shuter v. Hersh* (1), it has been held that:

"Where a tenant remains in possession under the provisions of the Increase of Rent, etc., Restrictions Act, 1920, after receiving notice to quit, there is no necessity for the landlord to give the tenant a fresh notice to quit before raising the rent to the extent permitted by the Act unless a new tenancy has been actually created, and the mere fact that the landlord accepts rent after giving the notice to quit cannot be taken as a waiver by him of the notice to quit so as to create a new tenancy."

[1] [1922] 1 K. B. 438.

Scrutton, L. J. refers to the entity described as the 'statutory tenant' as the person who holds the land of another contrary to the will of that other, who strongly desires to turn him out. Such a person would not ordinarily be described as a tenant and in spite of the fact that he was described as a tenant in the parliamentary statute the notice given to quit was accepted as a good notice and no further notice was considered necessary. I admit that the point which arises for decision in the present case did not arise for decision in that case, but the observations with regard to the validity of the notice given during the continuance of the protection of the Act to the tenant are useful in dealing with the present point.

The other case is the case of *Keeves v. Dean* (2). With reference to the point that arose in that case as to whether a statutory tenant would have the right to assign his right to retain the position, it was held that the right of a statutory tenant was merely a personal right to retain possession of the premises and could not be assigned to another person. The following observations of Scrutton, L. J. are useful (p. 694):

"This case is another stage in the unwelcome task which Parliament has imposed upon the Courts of defining the position of the 'statutory tenant.' My Lord has objected to his being called by that name, on the ground that he is not a tenant at all. But it is a convenient expression, and, although it is true that before the passing of these Acts no one would have spoken of a person who after the expiry of his tenancy remained in possession against the will of his landlord as a tenant, Parliament has certainly called him a tenant, and he appears to me to have something more than a personal right against his landlord. I take it that he has a right as against all the world to remain in possession until he is turned out by an order of the Court, and that he could maintain trespass against any person who entered the premises without his permission. However, it does not much matter what he is called so long as it is clear that one is speaking of a person who holds over after the

expiry of his tenancy against his landlord's will."

I may also refer to *Kalianmal v. Dharmsay* (3) where the learned Chief Justice makes the following observations with regard to the position of a person entitled to remain in possession under the statute (p. 144):—

"The plaintiff was entitled to terminate under the ordinary rules of law the contract which had been established between him and the defendants by the consent decree, and on August 31, 1922, when the plaintiff's notice expired that tenancy terminated. Had it not been for the Rent Act, the defendants would have been bound to vacate, but under its provisions they might remain in possession, and under S. 9 no order for the recovery of possession of the premises could be made so long as they paid or were ready and willing to pay rent to the full extent allowable by the Act, and perform the conditions of the tenancy. I presume that would mean the conditions of the tenancy existing between the parties before the agreement terminated, which would be continued to that extent by virtue of those words if the tenant remained in possession under the Act."

These decisions do not deal with the point which arises in the present case. But they throw a very useful light upon the position of the person who remains in possession under the protection of the statute after the contractual tenancy between him and his landlord has been duly terminated by a notice given during the period in which the Act is in force. I do not see any reason why on principle the landlord should be required to give a fresh notice to terminate a tenancy which in fact does not exist. So far as the contractual tenancy between him and his tenant is concerned it has been duly terminated and there is nothing in the provisions of the Rent Act to justify the contention that it cannot be terminated during the continuance of the Act. The mere fact that the tenant is entitled to retain possession while the Act remains in force is not sufficient, in my opinion, to create any such relationship of landlord and tenant between the parties as would require a fresh notice to terminate it. In fact it is a statutory right the limits of which are to be found in the terms of the statute: and the moment

(2) [1924] 1 K. B. 685.

(3) 1924 Bom. 330=26 Bom. L. R. 141.

the statute ceases to extend that protection to him he ceases to have the protection as against the landlord which the statute gave him up to a certain period. In the present case there is no scope for the argument that by accepting the rent, the landlord has waived the notice to quit and has treated the contractual tenancy as subsisting. I am, therefore, of opinion that the notice given on July 29 to the defendant was effectual and valid and put an end to the tenancy between the plaintiff and the defendant, and the fact that he was in rightful possession of the premises under the statute for one day against the will of the landlord does not constitute any such change in the legal relationship of the parties as would render any further notice necessary to terminate the tenancy.

[The learned Judge then held that on the facts and circumstances of the case Rs. 125 a month was fair compensation and decreed the suit.]

Suit decreed.

1925 BOMBAY 519

MACLEOD, C. J. AND COYAJEE, J.

Nanalal Lallubhai—Defendant—Applicant.

v.

Chhotalal Narsidas—Plaintiff—Opponent.

Civil Application No. 146 of 1924, Decided on 31st March 1925, for the revision of the decision of the First Class Sub-J., Surat, in Small Cause Civil Suit No. 477 of 1924.

(a) *Provincial Small Causes Courts Act, Sch. 2, Item 24*—Small Cause Court can try a suit to recover what is awarded to plaintiff by an award.

Where the award was admitted and the plaintiff only sought to recover what was awarded to him.

Held: that it was not a suit to contest an award and the Small Cause Court had jurisdiction. 13 *Mad.* 344. *Ref.* [P 519 C 2]

(b) *Limitation Act, Art. 120*—Scope.

A suit to enforce an award comes under Art. 120. [P 519 C 2]

M. V. Dave—for Applicant.

H. V. Divatia—for Opponent.

Macleod, C. J.—The plaintiff filed this suit as a Small Causes suit to recover money awarded to him against the defendant by an oral award delivered in July

1919. The suit was filed on March 3, 1924. The defendant pleaded: (1) that the Small Causes Court had no jurisdiction as the case came within Item 24 of the Second Schedule of the Provincial Small Cause Courts Act; (2) that the suit was barred by limitation. The Judge decreed the plaintiff's claim. Now item 24 in the Second Schedule refers to a suit to contest an award. The award in this case is admitted. The plaintiff is only seeking to recover what was awarded to him. It is, therefore, not a suit to contest an award, and the Small Cause Court has jurisdiction. Reference may be made to *Simson v. Mc Master* (1).

Then the defendant says that this is a suit for money; the period of limitation, is, therefore, three years. The plaintiff says that a suit to enforce an award comes under Art. 120. In *Rajmal Girdharlal v. Maruti Shivaram* (2), the plaintiff applied to file an award made on an arbitration out of Court. The application was numbered as a suit, but it was summarily rejected without trying the validity of the award, on the ground that treated as a suit it was time-barred. The plaintiff next filed a regular suit to enforce the award. It was objected to as being barred by *res judicata*, as well as by limitation. It was held that a suit to enforce an award was a suit not provided for by any other article of the Indian Limitation Act, so that the time was six years under Art. 120. The petitioner relies upon the decision of this Court in *Fardunji Edalji v. Jamsedji Edalji* (3). The question there was whether a suit on an award was a suit for specific performance. So far as we can gather, there was no question of limitation argued before the Court nor was it decided that a suit to enforce an award is in reality a suit to recover money directed by the award to be paid to the successful party, so that the period of limitation for such a suit was three years and not six.

The Rule, therefore, must be discharged with costs.

Rule discharged.

(1) [1890] 13 *Mad.* 344.

(2) [1920] 45 *Bom.* 329=59 *I. C.* 755=22 *Bom. L. R.* 1377.

(3) [1903] 28 *Bom.* 1=5 *Bom. L. R.* 705.

★ 1925 BOMBAY 520

MACLEOD, C. J. and COY AJEE, J.
Dayaram Surajmal—Appellant.

v.

Chandulal Dayabhai and others—Respondents.

O. C. J. Appeal No. 12 of 1925 in Suit No. 4418 of 1923, Decided on 8th July 1925.

★ (a) *Stamp Act, S. 12—Cancellation of a stamp on a hundi at a later date and not at the time of execution, is not valid.—Evidence—Admissibility.*

Where the stamp upon a hundi is cancelled at a later date and not at the time of executing the hundi the cancellation is not valid and the hundi should be treated as unstamped and so inadmissible in evidence.

[P 520 C 2]

Coltman and M. J. Mehta—for Appellant

Chimanlal Setalwad—for Respondents.

Macleod, C. J.—The plaintiff alleged that he was a holder in due course of a Shah Jog hundi for Rs. 900, dated February 10, 1922, drawn by one Jaggannath Gordhandas of Poona on Joraji Deoraj, the second defendant firm of Bombay, in favour of Venkatesh Ramachandra Shivanor of Belgaum. The plaintiff transmitted the said hundi from Gulberga to his branch firm at Secunderabad. In the course of transmission to Secunderabad the said hundi was stolen by some person not known to the plaintiff. It then came into the hands of the first defendant firm, who presented it for payment to the drawees, the second defendant firm. The first defendant received payment from the second defendant. The plaintiff claimed that the first defendant had no title to the hundi, and that the first defendant was bound to pay the same with interest as moneys had and received for and on behalf of the plaintiff. The plaintiff further submitted that the second defendant firm was not entitled to pay the amount to the first defendant firm as they had no title to the same. The plaintiff, therefore, prayed that the defendants be ordered to pay to the plaintiff the sum of Rs. 1,035 with interest on Rs. 900 at the rate of nine per cent. per annum from October 10, 1923, till judgment, and costs of the suit.

We are not concerned with any other issues which were raised at the trial, except the issue whether the hundi was properly stamped. The Judge found on

this issue that the instrument was unstamped, and therefore was inadmissible in evidence. The plaintiff's suit was then dismissed.

According to the evidence the hundi bore an uncanceled one anna stamp when it came into the hands of the first defendant firm. It was not, therefore, duly stamped at the time of execution. Under S. 12 (2) of the Indian Stamp Act:—

"Any instrument bearing an adhesive stamp which has not been cancelled, so that it cannot be used again, shall, so far as such stamp is concerned, be deemed to be unstamped."

Under S. 17:—

"All instruments chargeable with duty and executed by any person in British India shall be stamped before or at the time of execution."

There is one exception provided by S. 47 of the Act which enables certain documents chargeable with the duty of one anna, if unstamped, to be stamped at a later date. S. 47 says:—

"When any bill of exchange, promissory note or 'cheque chargeable with the duty of one anna is presented for payment unstamped, the person to whom it is so presented may affix thereto the necessary adhesive stamp, and upon cancelling the same in manner hereinbefore provided, may pay the sum payable upon such bill, note or cheque, and may charge the duty against the person who ought to have paid the same, or deduct it from the sum payable as aforesaid, and such bill, note or cheque shall, so far as respects the duty, be deemed good and valid."

If the second defendant firm, when the hundi was presented, had affixed the stamp and cancelled it, then the hundi would have been considered with regard to the payment of duty, a good and valid document. The evidence shows that some time on February 12, when the hundi was paid by the second defendant firm, Nagardas, a partner in the first defendant firm, noticing that the stamp on the hundi had not been cancelled, wrote across it the date "February 12, 1922." That would not, according to the provisions of the Act, make a document, which up to that time had been unstamped, stamped.

It is clear, therefore, that there has been no attempt whatever to comply with the provisions of S. 47 of the Act, and

the document still continues to be unstamped. We think then that the decision of the Judge was right and the appeal must be dismissed with costs.

Appeal dismissed.

★ 1925 BOMBAY 521

MACLEOD, C. J. AND COYAJEE, J.

Mahadeo Govind Wadkar—Petitioner.

v.

Lakshminarayan Ramnath Marwadi—Opponent.

Civil Extraordinary Application No. 229 of 1924, Decided on 26th June 1925, against the decision of the Sub-J, Mahad, in Miscellaneous Application No. 62 of 1922.

(a) *Ltm. Act, S. 5*—Section does not apply to application under Civil P. C., O. 9, R. 9.

Section 5 has not been made applicable by any enactment or rule to an application under O. 9, R. 9, and therefore, the Court has no jurisdiction to admit the application on the ground that the applicant had sufficient cause for not preferring his application within the time prescribed, [P. 521, C. 2]

★ (b) *Civil P. C., O. 47, R. 1 and O. 9, R. 8*—Dismissal under O. 9, R. 8—Remedy by review is not competent.

A plaintiff whose suit has been dismissed for want of appearance under O. 9, R. 8, has no remedy by way of review: [49 I. A. 144, *Foll.*] The words "any other sufficient reason" in subsection (1) mean a reason sufficient on grounds at least analogous to those specified in the rule. The fact that the applicant was absent when the suit was called on is not a ground analogous to any of those specified in the rule.

[P. 521 C 2; P. 522 C. 1]

V. B. Virkar—for Petitioner.

Macleod, C. J.—This is an application under S. 115, Civil Procedure Code. The opponent having filed Suit No. 139 of 1921, in the Court of the Second Class Subordinate Judge at Mahad, the suit was dismissed for default under O. 9, R. 8, Civil Procedure Code on October 30, 1922. He was then entitled under rule 9 to apply for an order to set the dismissal aside, and if he could satisfy the Court that there was sufficient cause for his non-appearance when the suit was called on for hearing, the Court could make an order setting aside the dismissal. But under Art. 163 of the Indian Limitation Act, the period of limitation for making such an application under R. 9 is thirty days. The opponent made his application on the 31st day, and was

therefore clearly out of time. Section 5 of the Indian Limitation Act has not been made applicable by any enactment or rule to an application under O. 9, R. 9, and, therefore, the Court had no jurisdiction to admit the application on the ground that the opponent had sufficient cause for not preferring his application within the time prescribed. The Judge, however, said :

"The question is whether the delay can be excused within the Court's discretion. The applicant is not to be blamed for sending the papers duly signed to his friend who was in business here. There is no negligence attributable to him on that score. If the mistake arose it arose with the mistaken view of that friend and hence I think the delay of one day should be excused properly in this case. Justice requires the exercise of discretion in that direction. To do otherwise would be clearly technical. Further, if I were not to excuse the delay there is nothing to prevent me from treating these two applications as for review and in that case they are clearly in time. When a case is dismissed purely for a default the plaintiff has two remedies generally, viz., one to apply to have the suit restored to file, and the other is by way of review. The second course is clearly open to the plaintiff and the Court, and hence I do not think that in the present application the delay of one day should not be excused. I excuse the delay and I hold the application to be in time."

That argument discloses an unfortunate confusion of thought. If the Judge had said : "I treat this application as one for review, and, therefore, pass an order setting aside the order of dismissal," then it is possible he might have been justified in making such an order. But he treated the application as one made under O. 9, R. 9, and excused the delay which he had no power to do. If as a matter of fact the opponent was entitled to apply for a review, we might not have been inclined to interfere with the decision of the Judge. But since the decision of the Privy Council in *Chhajju Ram v Neki* (1) we must take it that a plaintiff whose

(1) 1922 P. C. 112=8 I. A. 127=49 I. A. 144=80 M. L. T. 295=16 M. L. W. 37=26 C. W. N. 697=3 P. L. T. 435=17 P. W. R. 1922=24 Rom. L. R. 138=86 C. L. J. 460=48 M. T. L. 332 (P. C.).

suit has been dismissed for want of appearance under O. 9, R. 8, has no remedy by way of review, because the grounds on which a review can be granted are specified in Order 47, R. 1. The words "any other sufficient reason" in Sub-S. (1) mean a reason sufficient on grounds at least analogous to those specified in the rule. Now the grounds specified in the rule are as follows: The discovery of new and important matter or evidence, which, after the exercise of due diligence, was not within the party's knowledge, or could not be produced by him at the time when the decree was passed or order made, or on account of some mistake or error apparent on the face of the record. The fact that the opponent was absent when the suit was called on would not be a ground for review specified in O. 47, R. (1), Sub-R. (1), nor could it be a ground analogous to any of those specified in the rule.

It seems to us, therefore, that the only remedy open to a party whose suit has been dismissed for default under O. 9, R. 8, is to apply under R. 9 to set aside the order of dismissal, and it is no longer open to him to apply for a review of the order under O. 47, R. 1. That being our opinion, it was not open to the Subordinate Judge to entertain an application for review from the opponent, and as he had no power under the Indian Limitation Act to excuse the delay he ought to have dismissed the application. We must, therefore, make the rule absolute with costs.

Rule made absolute.

1925 BOMBAY 522

MACLEOD, C. J., AND COYAJEE, J.

Ganpati Kondaji Sandbhar—Petitioner.
v.

Maruti Gangaji Sandbhar—Opponent.

Civil Extraordinary Application No. 38 of 1925, decided on 26th June 1925, against an order of the Collector of Poona.

Mamlatdars' Courts Act (Bom. Act 2 of 1906), S. 23—Application to Collector for revision must not be rejected without hearing applicant or his pleader.

A person dissatisfied with the decision of the mamlatdar under the Mamlatdars' Courts Act, is entitled to be heard either in person or through his pleader when he applies to the Collector under S. 23 of the Act to revise the order of the Mamlatdar, before his application is rejected. [P 522, C 2]

A. G. Desai—for Petitioner.

V. D. Limaye—for Opponent.

Macleod, C. J.—The applicant is the lessee of certain property which was leased to him for ten years on July 30, 1921, by the owner, Kashibai, one of the terms of the lease being that the tenancy was to be forfeited if the tenant failed to pay the rent provided for in the lease. The opponent purchased the land in dispute from Kashibai on June 30, 1924, and got the lease in suit transferred to himself on August 20, 1923. As the applicant had not paid rent, the opponent filed a suit on June 19, 1924, in the Mamlatdar's Court to recover possession. The Mamlatdar decided the suit in favour of the plaintiff and directed that the plaintiff should be put in possession of the land. An application to the Collector to revise this order was rejected without hearing the applicant. He has now come to this Court asking us to interfere on the ground that the Collector ought not to have rejected the application without hearing the applicant or his pleader. We are not concerned in this application with the merits of the case. We are concerned with the important question of principle, namely, whether a person dissatisfied with the decision of the Mamlatdar under the Mamlatdars' Courts Act, is entitled to be heard when he applies to the Collector under S. 23 of the Act to revise the order of the Mamlatdar. Under S. 23 (1) there shall be no appeal from any order passed by a Mamlatdar under the Act. Under Sub-S. (2) the Collector may call for and examine the record of any suit under the Act, and if he considers that any proceedings, finding or order in such suit is illegal or improper, may, after due notice to the parties, pass such order thereon, not inconsistent with the Act, as he thinks fit. Under Sub-S. (3) where the Collector takes any proceedings under the Act, he shall be deemed to be a Court under the Act.

The Collector, therefore, must follow the ordinary rule of procedure followed by a Court, and it is one of those commendable rules of procedure which ought to be followed, that if any party is entitled to make an application to a Court, he is entitled to be heard either in person or through his pleader, before his application is rejected.

We think, then, that the Collector was wrong in rejecting the present application. We set aside his order declining to revise

the order passed by the Mamlatdar, and we direct him to hear the applicant on the question whether the application should be entertained. Rule absolute. No order as to costs.

Rule made absolute.

★1925 BOMBAY 523

MACLEOD, C. J. AND COYAJEE, J.

N. H. Moos—Petitioner.

v.

Abdul Husain Mulla Tyeballi—Opponent.

Civil Extraordinary Application No. 304 of 1923, Decided on 23rd June 1925, against the decision of the Presy. Court of Small Causes at Bombay in Suit No. 3860 1923.

★Receiver—Estate of a deceased person in receiver's hands—Money suit against deceased's heirs—Ex-parte order permitting plaintiff to add receiver as party—No decree can be passed against the receiver.

Where a money suit is filed against the heirs of a deceased party, whose estate is in the hands of a receiver, the receiver has nothing to do with the satisfaction of the claim, and all that the Court could do would be to pass a decree in favour of the plaintiff against the defendants, as the legal representatives of the deceased. The fact that the plaintiff obtained an ex-parte order from the Court appointing the receiver, granting him leave to add the receiver as a party does not in any way affect the question whether the Court which hears the suit can grant relief against the receiver. That question would have to be decided on the merits and clearly no decree could be passed against the receiver. If the decree against the other defendants was not satisfied, and the plaintiff wished to execute against the estate, he would have to go to the Court which appointed the receiver for permission to attach the estate of the deceased in the hands of the receiver.

If a party makes a claim for money due by a person who is dead against his representatives, then he can only get a decree against the representatives, to the extent of the assets in their hands, and if the estate is not in their hands, but in the hands of a receiver, the plaintiff will have to go to the Court that appointed the receiver, in order to attach the property in his hands. But by no possible conception could the receiver be a necessary party in a suit to decide whether the plaintiff was entitled against the legal representatives of the deceased to recover money which he had advanced to the deceased in his lifetime. 14 C. W. N. 653; and 15 C. W. N. 54, Ref. [P 523, C 2; P 524 C 1]

G. N. Thakor—for Petitioner.

Macleod, C. J.—This is an application in revision by Mr. Moos, who was appointed receiver by an order of the High

Court for administering the estate of one Kadarbhai Issaji now deceased. The plaintiff filed a suit in the Small Causes Court, Bombay, against the heirs and legal representatives of the deceased owner of the estate. He added the receiver as a party to the suit and obtained ex-parte leave from the High Court to sue the receiver. It should have been obvious that no relief could have been granted against the receiver in a suit filed in the Small Causes Court. When the suit came up for hearing the Judge passed a decree against Defendants Nos. 2 to 8, who were the heirs of the deceased, and dismissed the suit against the receiver. The plaintiff then appealed to the full Court, praying that the dismissal of the suit as against the petitioner might be set aside, and a decree for the amount claimed passed against him. The Full Court delivered judgment setting aside the order of dismissal and passing a decree against the receiver as prayed.

That would appear at first sight to be a very strange decision on the part of the Full Court. The grounds for passing a decree against the receiver are as follows:—

"The receiver was sued with the leave of the Court which appointed him. He was a necessary party as plaintiff wanted the property in his possession, i. e., the assets in his hands, to be made available for the satisfaction of his claim. The High Court in granting leave must have considered this aspect of the case, and if he is a necessary party, the suit as against him cannot be dismissed. The two cases of *Jotindra Naih v. Sarfaraj* (1) and *Banku Bihari Dey v. Harendra Nath Mukerjee* (2), are explicit authorities on the point, and they decide that when the receiver is made a party after leave to sue him has been obtained, the suit as against him cannot be dismissed; the property in his charge is directly sought to be affected.

Where a money suit is filed against the heirs of a deceased party, whose estate is in the hands of a receiver, the receiver has nothing to do with the satisfaction of the claim, and all that the Small Causes Court could do would be to pass a decree in favour of the plaintiff against the defendants, as the legal representatives of the deceased. The fact that the

(1) [1910] 14 C. W. N. 653=6 I. C. 214.

(2) [1910] 15 C. W. N. 54=8 I. C. 1.

plaintiff obtained an ex-parte order from the High Court granting him leave to add the receiver as a party does not in any way affect the question whether the Court which hears the suit can grant relief against the receiver. That question would have to be decided on the merits, and clearly no decree could be passed against the receiver. If the decree against the other defendants was not satisfied, and the plaintiff wished to execute against the estate, he would have to go to the High Court for permission to attach the estate of the deceased in the hands of the receiver.

It is further remarked in the judgment of the third Judge that:—

"The receiver is the representative for the persons who may ultimately be found legally entitled to the property and as such is a necessary party to the suit. In any event no injustice could be caused to the estate as any decree passed herein would have to be executed against the receiver only with the leave of the Court that appointed the receiver."

That, with all due respect, is an argument vitiated by a very patent fallacy. If a party makes a claim for money due by a person who is dead against his representatives, then he can only get a decree against the representatives, to the extent of the assets in their hands, and if the estate is not in their hands, but in the hands of a receiver, the plaintiff will have to go to the Court that appointed the receiver, in order to attach the property in his hands. But by no possible conception could the receiver be a necessary party in a suit to decide whether the plaintiff was entitled against the legal representatives of the deceased to recover money which he had advanced to the deceased in his lifetime.

The rule, therefore, must be made absolute, and the decree of the Full Court set aside and that of the trial Court restored with costs throughout. If the receiver cannot recover his costs, then he can apply to have them included in his account.

Rule made absolute.

1925 BOMBAY 524

MACLEOD, C. J., AND COYAJEE, J.

Vidyavardhak Sangh Company—Appellants.

v.

Ayyappa Sangirimallappa and others—Respondents.

Second Appeal No. 455 of 1924, Decided on 1st July 1925, from the decision of the First Class Sub J., Bijapur, in Appeal No. 27 of 1923.

Bombay Land Revenue Code (5 of 1879), S. 84—Annual Tenancy—Disclaimer of landlord's title causes forfeiture—Notice to quit is unnecessary.

A disclaimer of the lessor's title by the annual tenant of a holding to which S. 84 applies, is, if made prior to suit, a sufficient cause of action to enable the lessor to recover possession without proof of notice to quit, even where the T. P. Act does not apply: 20 Bom. 354 (F.B.), *Foll.*; 22 Bom. L.R. 1214, *Dist.* [P. 525, C. 1, P. 526, C. 1]

Nilkant Atmaram—for Appellants.

H. B. Gumaste—for Respondents Nos. 1 and 2.

Macleod, C. J.—This action was instituted by the plaintiffs to recover possession, together with mesne profits and costs, of the land in dispute from the defendants, alleging that the land belonged to the father of Defendant No. 3 who agreed to look after the trees, plant new trees and pay rent equal to the assessment, and that Defendant No. 3 having denied their title they were entitled to take possession without giving any notice to quit.

The learned trial Judge found all the allegations of the plaintiffs proved, but thought that notice to quit was necessary; and on that ground he dismissed the plaintiffs' claim for possession.

The appellate Judge having referred to various decisions said:—

"From the rulings cited above it is clear that a disclaimer of the landlord's title works forfeiture. The fact that there has been a disclaimer is not disputed. I, therefore, hold that no notice to quit is necessary in this case."

Accordingly the decree of the trial Court was set aside and a decree was passed for possession.

In *Venkaji Krishna Nadkarni v. Lakshman Devi Kandar* (1), the following question was referred for decision of the Full Bench:—

(1) [1895] 20 Bom. 354 (F.B.).

Whether in this Presidency a disclaimer of the lessor's title by the annual tenant of a holding to which S. 84 of the Land Revenue Code (Bom. Act V of 1879) applies, is, if made prior to suit, a sufficient cause of action to enable the lessor to recover possession without proof of notice to quit.

Sir Charles Sargent, in giving judgment of the Full Bench, said (p. 361) :—

"The object of S. 84 is to define the nature of the contract creating an annual tenancy, which, it is to be remarked, may be for agricultural or other purposes, both as regards the period during which it runs and the landlord's power of determining it. The landlord's right of forfeiture, however, arising from disclaimer of his title, although it is treated as determining the tenancy at his election, is no part of the contract of tenancy, but it is a right which the law implies in all cases from the relationship of landlord and tenant. Had it been the intention of the legislature to exclude the right of forfeiture in the case of all annual tenancies, we should have expected to find it expressly provided for. S. 111 of the Transfer of Property Act (IV of 1882), which gives the right of forfeiture, is, in common with all the provisions of Chapter V of the Act, declared to be inapplicable by S. 117 of the Act in the case of all leases for agricultural purposes, except so far as the Local Government may have otherwise declared. That Act, however, did not become the law of this Presidency before January 1893, subsequent to the institution of this suit. In *Vithu v. Dhondi* (2), which was a case in which it was assumed that notice was required by S. 84 of the Land Revenue Code, it was not contended that the right of forfeiture had been taken away by the section. We think, therefore, that the first question should be answered in the affirmative, assuming the case not to be governed by S. 117 of the Transfer of Property Act."

The tenancy in this case commenced before 1878, so that the provisions of the Transfer of Property Act would not apply.

In *Ochhavlal v. Gopal* (3), the question arose whether an annual tenancy to which the Bombay Land Revenue Code applied could be determined without a notice in writing by the landlord. It was urged before the Court that it could be so deter-

mined, because there was a repudiation of the landlord's title. As a matter of fact in that case, there was no repudiation of the landlord's title by the tenant. Apart from that, the Court considered that effect must be given to the express provisions of the Bombay Land Revenue Code. As no such notice was given the annual tenancy had not been determined. But in that case the defendant tenant did not disclaim the landlord's title, but merely contended that the plaintiffs had no right to expect payment of rent on a fixed date. Therefore the relationship of landlord and tenant still existed.

The facts are somewhat similar in the case of *Rama v. Abdul Rahim* (4), where it was held that the setting up of a permanent tenancy by a yearly tenant is not tantamount to disclaimer of the landlord's title. Such a tenant is, therefore, entitled to a notice to quit before he can be evicted by the landlord.

It must be noted that in the case of *Ochhavlal v. Gopal* (3) the Full Bench decision in *Venkaji v. Laxman* (1) was not referred to.

In *Maharaja of Jeypore v. Rukmini Pattamahadevi* (5), it was said in the judgment of the Privy Council: The repudiation of the landlord's title by the tenant will in certain circumstances work a forfeiture. This is not the ancient Indian law, but has been adopted by the Courts from the law of England, and is now embodied in the Transfer of Property Act, 1882, S. 3 of which merely gives statutory form to a rule already in force. The denial which operates forfeiture must, now, be by matter of record before institution of any suit for forfeiture, and must be in clear and unmistakable terms.

It may also be noticed that in *Rama v. Abdul Rahim* (4), Mr. Justice Fawcett, said (p. 1220, Bom. L. R.) :—

"In the case of an agricultural lease such as the present, S. 84 of the Land Revenue Code lays down that in the absence of any special agreement in writing to the contrary an annual tenancy shall require for its termination a notice given in writing in a certain form. Therefore, even where there has been a disclaimer of the landlord's title, such notice

(4) [1920] 22 Bom. L.R. 1214=59 I.O. 279.

(5) [1919] 42 Mad. 589=46 I.A. 109=17 A.L.J. 552=10 L.W. 381=36 M. L. J. 543=29 O.L.J. 528=21 Bom. L. R. 655=(1919) M. W.N. 271=23 O.W.N. 889=59 I.C. 681=26 M.L.T. 16 (P.C.).

(2) [1890] 15 Bom. 407.

(3) [1907] 32 Bom. 78=9 Bom. L.R. 1832.

is necessary to determine an annual agricultural tenancy in this Presidency."

His Lordship referred to *Vithu v. Dhondi* (2) and *Ochhavlal v. Gopal* (3).

But in the first place, that particular question was not before the Court. Secondly, no reference was made to the Full Bench decision in *Venkaji Krishna Nadkarni v. Lakshman Derji Kandar* (1). We think then that this case comes within the purview of the Full Bench decision, and that no notice was required to determine the tenancy, once the tenant had disclaimed the landlord's title. We, therefore, confirm the decision of the lower appellate Court and dismiss the appeal with costs.

Coyajee, J.—I agree.

Appeal dismissed.

1925 BOMBAY 526

FAWCETT AND MADGAVKAR, JJ.

Emperor

v.

Basappa Rachappa Hundekar—Accused.

Criminal Reference No. 31 of 1925, Decided on 1st July 1925, made by the Dist. Mag. of Bijapur.

Motor Vehicles Act (8 of 1914), Ss. 5 and 18 (2)—*Dangerous driving*—*Fine should be proportionate to means of accused*—*In case of professional drivers the best course is to exercise powers under S. 18 (2).*

The general rule is that the fine imposed on an accused person should not be excessive, having regard to his pecuniary means. The best way to stop dangerous driving by persons, who earn their livelihood by driving motor vehicles, is for the Court, on conviction of the offender, to exercise its powers under Sub-S. (2) of S. 18, under which such Court "shall cause particulars of the conviction to be endorsed" on any license held by the accused, and may (1) cancel or suspend that license, or even (2) declare the accused disqualified for obtaining a license either permanently or for such period as it thinks fit. The exercise of that power will have a very deterrent effect, especially in the case of persons who earn their livelihood by driving motor vehicles. [P 526 C 2]

S. S. Patkar, Government Pleader—for the Crown.

Ankalikar and H. B. Gumaste—for Accused.

Fawcett, J.—In this case the District Magistrate has moved this Court to enhance the sentence of fine passed on four

accused persons who were motor-drivers and were convicted of the offence of dangerous driving under S. 5 of the Indian Motor Vehicles Act (VIII of 1914) Each of them was sentenced to pay a fine of Rs. 25. This Court, however, has only issued notice for enhancement of sentence in the case of accused No. 1 Basappa Rachappa.

The main facts are these:—Basappa was driving a motor-car which takes passengers between Bagalkot and Hongal and the other accused were driving similar motor vehicles. The Magistrate held that they were in fact racing, while they were driving along the road; and the car driven by Accused No. 1 Basappa knocked down a man who sustained injuries to his legs and had to be treated in hospital for some time in consequence. There seems no doubt upon the evidence that the convictions of the four Accused or at any rate that of Accused No. 1, with whom alone we are concerned, is justified. But the maximum penalty provided for the offence is a fine of Rs. 500, and the general rule is that the fine imposed on an accused person should not be excessive having regard to his pecuniary means. In the present case there is nothing to suggest that Accused No. 1 was a 'person of such means, as would make it appropriate to impose a fine of (say) Rs. 100, such as was suggested by the Government Pleader. In my opinion the best way to stop dangerous driving of the kind in question is for the Court, on conviction of the offender, to exercise its powers under Sub-S. (2) of S. 18, under which such Court "shall cause particulars of the conviction to be endorsed" on any license held by the accused, and may (1) cancel or suspend that license, or even (2) declare the accused disqualified for obtaining a license either permanently or for such period as it thinks fit. That is a very substantial power, the exercise of which will have a very deterrent effect, especially in the case of persons like the accused who earn their livelihood by driving motor vehicles. In the present case the learned Magistrate has not complied with the direction contained in this sub-section that he should endorse particulars of the conviction upon the accused's license. At any rate there is nothing in the record which shows that that was done or directed to be done. We think that the accused, who is said to be

still driving motor cars, should be ordered to surrender his license to the Magistrate in order that the necessary particulars may be endorsed thereon. It would have been, I think, appropriate if the Magistrate had suspended the accused's license for, say, six months, having regard to the fact that he was driving the car which knocked over the injured man. But as the offence took place in July 1924 and the period for which the accused's license was then in force has probably expired, we do not think that we can appropriately pass an order of suspension or cancellation. The order of endorsement will, we think, be a sufficient enhancement of sentence in the circumstances of the case.

Sentence enhanced.

★ 1925 BOMBAY 527

MACLEOD, C. J., AND COYAJEE, J.

Ramprasad Shivalal and others—Appellants

v.

Shrinivas Balmukund and others—Respondents.

O. C. J. Appeal No. 25 of 1925, Decided on 10th July 1925, against the decision of Crump, J., in Suit No. 3454 of 1922.

★ (a) *Limitation Act, S. 22—Substitution of the names of coparceners is only correction of misdescription and not addition of parties and the section does not apply.*

S. 22 refers to cases where a new defendant is substituted or added. The substitution of the names of the coparceners for what is admittedly a joint family business is no more than the correction of a misdescription and not an addition of parties and so the section is not applicable. [P. 527 C. 2]

★ (b) *Evidence—Admissibility in evidence of an insufficiently stamped document is to be decided from the document and not from collateral circumstances—Stamp Act, S. 2 (11).*

The Court, in determining whether a document is sufficiently stamped for the purpose of deciding upon its admissibility in evidence, will look at the document itself as it stands, and not at any collateral circumstances which may be shown in evidence. 16 Cal. 432 and 6 Bom. L. R. 690, *Foll.* [P. 528 C. 1]

★ (c) *Negotiable Instruments Act, S. 118—Provisions of section do not apply to a question of admissibility in evidence of a document.*

The provisions of S. 118 of the Negotiable Instruments Act (1881) do not affect the question with regard to the admissibility in evidence of a document which depends entirely upon the document as it stands. [P. 528 C. 1]

(d) *Civil P. C. S. 35—When costs do not follow event, reasons must be given—Plaintiff who is not guilty of misconduct is not disentitled to his costs.*

The ordinary rule is that costs should follow the event. It is generally necessary that, when costs do not follow the event, the particular reasons should be given why the ordinary rule should not be followed. Where there are no circumstances in a case which show that the plaintiff is in any way guilty of misconduct he should not be disentitled to his costs.

[P. 528 C. 2, & P. 529 C. 1]

(e) *Minor—Right to sue.*

A minor can sue as a bearer of a Shah jog handi. [P. 528 C. 1]

Chimanlal Setalvad and Kania—for Appellants.

Coltman and Munshi—for Respondents.

Macleod, C. J.—The plaintiff filed this suit to recover the sum of Rs. 15,000 claimed to be due on three hundis drawn by the defendants on one Chhotaram Javer in Bombay payable to Shah which were handed over to the plaintiff. Various objections were raised in the written statement, one of which regarding the non-cancellation of the stamps on two of the hundis was successful. The other objections were disallowed, and the Judge passed a decree against the defendant on the third hundi for Rs. 5,000.

The same objections have been raised before us. The first objection was that the suit was time-barred. The defendants in the plaint were described as "Shivalal Ramprasad a firm doing business as merchants at Ahmedabad," and thereafter, when it was discovered that Shivalal Ramprasad was a joint Hindu family doing business under that name, and that the provisions of O. 30 (Civil Procedure Code) would not apply when defendants were members of an undivided Hindu family, the title of the plaint was amended by substituting the names of the members of the family for the firm's name "Shivalal Ramprasad."

It was then contended that the provisions of S. 22 (1) of the Indian Limitation Act applied, and that the suit was barred, as the suit must be deemed to have been instituted against the defendants when the plaint was amended. The learned Judge considered, on a review of the authorities, that there was not an addition of parties, but only a substitution in order to correct a misdescription. We need only say that we agree with that finding.

It was next contended that the plaintiff could not sue as he was a minor at the date of the suit. The plaintiff was not a party to any contract on which he is suing. He is suing as the bearer of a Shah Jog hundi. We see no reason why he should not be allowed to sue on such a document. This point does not appear to have been raised in the lower Court.

The next point was that the hundi is inadmissible as it is post-dated. The question of its inadmissibility would arise under the Indian Stamp Act. It is a bearer hundi payable on demand, and requires, therefore, a one anna stamp. But it is said that it was proved that the document was written, not on February 12, the date it bore, but some date in January 1921; therefore, it was not properly stamped and, therefore, it infringed the provisions of S. 68 of the Indian Stamp Act. There is a series of decisions referred to by the learned Judge which show that the Court, in determining whether a document is sufficiently stamped for the purpose of deciding upon its admissibility in evidence, will look at the document itself as it stands, and not at any collateral circumstances which may be shown in evidence. That was held by the Calcutta High Court in *Ramen Chetty v. Mahomed Ghose* (1). The various authorities on the question are also fully considered in *Motilal v. Jagmohandas* (2). We do not think that the provisions of S. 118 of the Negotiable Instruments Act 1881 affect the question at all with regard to the admissibility in evidence of a document which depends entirely upon the document as it stands.

The next point was that the hundis were not drawn on behalf of the joint family firm of the defendants. We entirely agree with the remarks of the learned Judge that that is not an honest defence.

The last question was whether there was any consideration for the hundi. That is a question of fact. The learned Judge said :—

"The assets of the old Ahmedabad firm of Raman and Natumalji were in their hands. These include a profit of Rupees 1,26,000 which was available for distribution among the coparceners. Plaintiff's case is that defendants agreed to pay him this sum of Rs. 15,000 on account of the share which would come to

him at the distribution. Similar payments were made by defendants to other coparceners. I do not for a moment believe that the payment was promised as a loan. The position was that defendants had joint family funds in their hands. They knew that plaintiff's share would amount to more than Rs. 15,000, and they gave the hundis in part payment. Indirectly if not directly they were bound to account to plaintiff as to the other coparceners."

The defendants relied upon the evidence of Ramprasad Shivalal to show that when he drew the hundis it was intended that the money should be advanced to the plaintiff as a loan. But his admissions in cross-examination entirely destroy the effect of what he said in examination-in-chief. The fact that the plaintiff filed the suit to recover the balance of the share due to him as a coparcener without mentioning these hundis, could not possibly affect the question, because there was no necessity to refer to these hundis, as having been dishonoured nothing had been recovered on them.

We think the decision of the Court below was correct and the appeal must be dismissed with costs.

The plaintiff has filed cross-objections against the order as to costs.

The suit was filed on three hundis. I have dealt with the objections taken generally to all the hundis, which have been disallowed. With regard to two of the hundis an objection was taken at the hearing although, no issue was raised thereon, that they were not admissible owing to the stamp not being properly cancelled. The Judge decided that point in favour of the defendants. But in passing the decree for Rs. 5,000 on the third hundi, he made no order at all with regard to the plaintiff's costs, without giving any particular reasons, except that he said that in the circumstances of the case he would not allow costs. Now the ordinary rule is that costs should follow the event. It is generally necessary that, when costs do not follow the event the particular reasons should be given why the ordinary rule should not be followed. With regard to the general costs of the action, the plaintiff has succeeded on all the points which were raised by the defendants against the plaintiff's claim to make them liable on the hundis, and as the suit will be taxed according to the High

(1) [1889] 16 Cal. 432.

(2) [1904] 6 Bom. L. R. 699.

Court Rules and are not ad valorem, the costs in this case are exactly the same whether the suit was filed on one hundi for Rs. 5,000 or three hundis of Rs. 5,000 each. There are no circumstances in the case which show that the plaintiff was in any way guilty of misconduct which might disentitle him, even if successful, to his costs. The only fact before us is that an objection was taken in Court as to two of the hundis, and after argument that objection proved successful. To the extent to which any costs could be attributed to that point on which the defendants succeeded, they are entitled to their costs against the plaintiff. We leave it to the Taxing Master to decide what were the costs of the following issue, which I frame as no issue on the question was raised at the trial: Whether two of the suit hundis are admissible in evidence owing to the non-cancellation of the stamps. With regard to the rest of the costs, we think that the successful plaintiff in the Court below is entitled to them. He will be entitled to the costs of the cross-objections.

Coyajee, J.—I concur.

Appeal dismissed.

★ 1925 BOMBAY 529

CRUMP, J.

Emperor

v.

Anandrao Gangaram Phanse.

Cr. Case No. 22 of 1925, Decided on 18th May 1925.

(a) *Evidence Act, Ss. 26, 74 and 80—"Police Officer" and "Magistrate" in S. 26 include "Police Officers" and Magistrates" of Native States—But as to procedure disregard of the Criminal P.C. or local law does not affect admissibility of record in British India—Evidence Act, Ss. 74, 80 and 26.*

The words "Police officer" and "Magistrate" in S. 26 of the Evidence Act include the police officers and Magistrates of Native States. (22 Bom. 235 Foll. but doubted). But as regards the question of procedure, a Magistrate of a Native State is not bound by the Code of Criminal Procedure nor any failure by such Magistrate to follow the provisions of the local law can affect the admissibility of any record in a Court in British India. [P. 530, C. 1 2.]

(b) *Criminal P. C., S. 164—Magistrate of Native State recording accused's explanation for purpose of Extradition Rules is not recording*

statement of accused in investigation under Ch. 14.

Magistrate of Native State recording the explanation of an accused for the purpose of the Extradition Rules of that State is not recording the statement of an accused person in the course of an investigation under Chapter XIV of the Criminal P.C. [P. 530, C. 2]

★ c) *Evidence Act, S. 24—Threats made but not influencing accused—Confession is admissible.*

Where threats are made to the accused but the accused makes the statements deliberately, i.e., uninfluenced by the threats, S. 24 does not apply. 25 Bom. 168. Foll. [P. 530, C. 2]

★ (d) *Evidence Act, S. 25—Incriminating statement to police officer, though on face of it, self-exculpatory is inadmissible.*

An incriminating statement made to a police officer cannot be proved against an accused person even where such statement is on the face of it self-exculpatory. 6 Bom. 34. Foll. [P. 531 C. 1]

★ (e) *Evidence Act, S. 25—Confession made to police officer—Accused merely repeating before Magistrate the fact and contents of the previous confession—Statement to Magistrate is inadmissible in evidence.*

Where an accused person makes a confession of his guilt before a police officer and subsequently repeats before a Magistrate the fact and contents of his earlier confession but does not vouch for its truth, S. 25 makes the statement before the Magistrate inadmissible. [P. 531, C. 2]

Kanga—for the Crown.

Velinkar and Jinnah—for Accused.

Crump, J.—The Advocate General desires to tender as evidence the statement of Accused No. 9 recorded at Indore by Mr. Mital on February 9, 1925.

The defence object on various grounds:

A statement made by an accused person to a Magistrate may be inadmissible in evidence owing to some defect in the procedure followed in recording the statement. In the present case I do not feel myself pressed by any considerations of that nature.

It is abundantly clear that the Indore official who recorded this statement (Mr. Mital) was acting under R. 11 of the Indore Extradition Rules. For the purposes of that rule it was necessary for him to ask the accused if he had any explanation to offer on the facts upon which his extradition was sought. That explanation he was bound to record in accordance with the provisions of S. 346 of the Code of Criminal Procedure in force in Indore. Mr. Mital did that which the law of Indore enjoined upon him.

Now, as I understand the matter, Mr. Mital is not a Magistrate for the purposes of the Code of Criminal Procedure in

force in British India. Therefore he was not bound to comply with the provisions of that Code. His failure to do so—as assuming there be such failure—cannot by any conceivable process of reasoning render a statement made to him by an accused person inadmissible in evidence. Further, any failure on his part to comply with the requirements of the law of the Indore State—assuming there be such failure—is a matter with which this Court is in no way concerned, for the plain reason that the law of the Indore State is not in force in British India. The statement recorded by Mr. Mital is, in my opinion, so far as procedure goes, on no other footing than an extra-judicial statement. If that is so, the position is clear. Mr. Mital's evidence proves the statement. I wish to make it clear that I am dealing now with those objections which are based either on the Code of Criminal Procedure or the Indore Criminal law. I am in no way considering the provisions of the Indian Evidence Act which are relevant first on the question of the proof of such a statement (Ss. 74 and 89), and, secondly, as affecting the admissibility of the contents of the statement.

In *Queen-Empress v. Nagla Kala* (1) this Court has held that the words "police officer" and "Magistrate" in S. 26 of the Indian Evidence Act include the police officers and Magistrates of Native States, and following *Queen-Empress v. Sundar Singh* (2) that the word "Magistrate" in S. 80 includes a "Magistrate" of a Native State. In *Emperor v. Dhanka Rama* (3) a bench of this Court appears to have taken a contrary view so far as S. 80 is concerned. In neither case has S. 74 been considered. That in my opinion, is the section applicable to the proof of such statements. Here, however, the Magistrate has been called and the question of proof does not arise. So far as concerns the interpretation of S. 26 I am bound by this decision though I doubt its correctness, and it follows that S. 25 would have to be similarly construed. But as regards the question of procedure it has never been held, nor do I think it could be held, that a Magistrate of a Native State is bound by the Code of Criminal Procedure, or that any failure by such Magistrate to

follow the provisions of the local law could affect the admissibility of any record in a Court in British India.

But in any event I should have no difficulty in holding that if any failure to comply with the provisions of the Code of Criminal Procedure could be urged in this case that defect is cured by the evidence of the Magistrate and for this purpose I should rely on S. 533 of that Code. If we treat Mr. Mital precisely as we should treat a Magistrate appointed under that Code—in my opinion an inadmissible line of argument—then his examination under S. 533 of that Code shows that the accused has been in no way prejudiced by any formal defect.

Further, I agree with the Advocate-General that, apart from the grounds set out above, S. 164 of the Code of Criminal Procedure cannot have any application to the proceedings with which I am concerned. There was no "investigation under Chapter XIV of that Code" and S. 164 applies only to statements recorded in investigations under that Chapter. Without assenting to the particular conclusion arrived at, I would here cite the decision of Mukerji, J., in *Emperor v. Panchkowri Dutt* (4) where that learned Judge holds that S. 164 is on the same ground not applicable to certain confessions recorded by Presidency Magistrates. It is impossible to hold that an Indore Magistrate recording the explanation of an accused for the purpose of the Indore Extradition Rules is recording the statement of an accused person in the course of an investigation under Chapter XIV of the Code of Criminal Procedure.

I now turn to the provisions of the Indian Evidence Act. On the evidence, I am satisfied that the statement was voluntary. Mr. Mital satisfied himself on this point and warned the accused that it might be used against him. The accused's pleader was present at that time. I cannot infer any threat or inducement merely from certain vague statements in the document itself. Even if those statements have any foundation, the position was that the accused, while complaining of the threats used to him, deliberately made the statement. S. 24 of the Indian Evidence Act causes me no difficulty in this matter.

(1) [1896] 22 Bom. 235.

(2) [1890] 12 All. 595=(1890) A.W.N. 199.

(3) [1914] 16 Bom. L.R. 261=24 I.C. 169=15 Cr. L.J. 433.

(4) 1925 Cal. 587=52 Cal. 67=29 C.W.N. 300=26 C.L.J. 732.

The decision of this Court in *Queen-Empress v. Basvanta* (5) is in point here.

The difficulty which I feel—and it is a very serious difficulty—arises from S. 25 of the same Act. That section runs as follows:—

“No confession made to a police officer shall be proved as against a person accused of any offence.”

The prohibition is absolute and is not qualified by any succeeding section of the Act, except S. 27 which does not apply here. This Court in a series of consistent rulings has declined to allow any incriminating statement made to a police officer to be proved against an accused person even where such statement is on the face of it self-exculpatory. The leading case is *Imperatrix v. Pandharinath* (6) and it has been followed in many subsequent cases which I need not cite. The statement, with which I am now concerned, is self-exculpatory in tone, but contains admissions most damaging to the accused. Indeed I understood the Advocate-General to concede that if this is a statement made to a police officer it is excluded by S. 25.

The sole point, therefore, which remains is this: Are the prosecution seeking to prove a statement made to a police officer? In form it is a statement to an Indore Magistrate, but what is it in substance? I have never yet in the course of my experience as a criminal Judge seen a statement of this nature, and so far as I am aware no such statement has yet been judicially considered. But if it is read dispassionately from beginning to end it is not possible to escape this conclusion that the accused person is repeating, practically without comment, the conversation between himself and the Commissioner of Police, Bombay. It was suggested by the Advocate-General in the stress of argument that there was nothing to show that any such conversation took place. But obviously were that so the whole story is necessarily false; for there is not one single independent allegation of fact from beginning to end. It is further clear that nowhere does the accused vouch for the correctness of the dialogue which he reports. He says no more than this: “I humbly said to him (the Police Commissioner) that I would make a true state-

ment.” He does not say to the Magistrate: “The story is a ‘true story’; neither does he say: “The story is a false story.” He says no more than this: “Here is the story which I told to the Police Commissioner in Bombay,”

The problem may be simplified. A is being tried for the murder of X. He says to a Magistrate: “I told a police officer that I killed X.” Is that statement excluded by S. 25 of the Indian Evidence Act? In form it is a statement to a Magistrate but in substance what is it? Had he said to the Magistrate “I told a police officer that I killed X, and that was true,” the matter would be different. The real meaning would be: “I told a police officer that I killed X and that, viz., that I killed is true.” This is in substance a confession to a Magistrate. But without any qualification the words: “I told a police officer that I killed X,” remain a confession to a police officer and nothing more. The question was discussed in argument whether, if an accused person himself made such a statement at his trial, the Court could use that statement. The answer clearly is that in such a case it would be difficult to hold that it was sought to be proved against the accused; and a further answer is that the words by themselves are wholly ambiguous, and would merely invite the further question: “Is what you told the police officer true or is it false?” It is more relevant to point out that had the Magistrate himself heard the confession to a police officer, he could not be permitted to prove it.

The point is no doubt a somewhat subtle one, but the difficulty is real. I have read this statement many times and have weighed it in the light of the considerations I have set out above; and in my opinion to permit it to go on the record would be to allow a confessional statement to a police officer to be proved against an accused person. That the law forbids. To my mind the medium by which it is sought to prove such a statement does not alter the matter. The question is: “To whom was the statement made?” The answer is that the statement was made to a police officer. It was no doubt repeated to a Magistrate of the Indore State, but the mere repetition cannot render capable of proof a statement which as made the law excludes.

(5) [1900] 25 Bom. 168=2 Bom. L. R. 761.

(6) [1881] 6 Bom. 34.

1925 BOMBAY 532

MACLEOD, C. J., AND COYAJEE, J.

Sorabji Rustomji Subedar—Plaintiff—Appellant.

v.

R. H. Patuck—Defendant — Respondent.

O. C. J. Appeal No. 7 of 1925, Decided on 8th July 1925.

City of Bombay Municipal Act (Bom. Act 3 of 1888), S. 147—Additional Municipal tax—Tenant liable to pay such tax—Notice is not necessary—Bombay Rent (War Restrictions) Act (Bom. Act 2 of 1918), S. 6.

S. 6 of the Bombay Rent (War Restrictions) Act, 1918 applies to an entirely different state of facts to that which was intended to be covered by the provisions of S. 147. Under S. 147 (1), where the rent paid by the tenant is less than the rateable value, the landlord can recover from the tenant the tax which he has to pay on the difference between the rent payable by the tenant and the rateable value fixed by the Municipality. The right to claim from the tenant, under S. 147 (1), payment of a certain portion of the Municipal taxes, which are primarily leviable under S. 146 from the lessor, has nothing to do with the question of rent payable by the tenant. [P 533 Cs. 1 & 2]

Chimanlal Setalvad—for Appellant.*Coltman*—for Respondent.

Macleod, C. J.—The plaintiff filed this suit in the Small Causes Court claiming to recover rent of premises let out to the defendant. They were originally let to the defendant in September 1917, for a period of two years at Rs. 55 a month. The defendant paid that rent up to October 1918, and thereafter was willing to pay Rs. 44 a month, which he alleged to be the standard rent. The plaintiff claimed that the basis for the standard rent was Rs. 55, that the premises were not let out at their full and proper value of Rs. 55 a month on January 1, 1916, but at a concessional rent of Rs. 40 to the plaintiff's sister's husband and, therefore, he was entitled to charge the defendant Rs. 60-8-0. The plaintiff also stated that he had spent Rs. 58,000 for extensions and improvements to the premises in 1919, and so he claimed standard rent at Rs. 110 from July 1920, on the basis of the said improvements and extensions. He further claimed that he had to pay Municipal taxes on a higher rateable value, and had paid Rs. 400 to the Municipality for the said excess up to September 30, 1921. The fact that the rateable

value was increased was due, according to the plaintiff, to the defendant's sub-letting a portion of the premises at a rent of Rs. 225, after they had been improved.

On the application of the defendant the suit was transferred to the High Court. The defendant then filed his written statement and counter-claim. The following issues were raised at the hearing before Mr. Justice Pratt :—

(1) What is the standard rent of the premises in defendant's occupation?

(2) What is the expenditure incurred by the plaintiff in making improvements or structural alterations, if any, to the premises in defendant's occupation?

(3) From what date is the plaintiff entitled to such increase, if any?

(4) Whether the plaintiff agreed to restore defendant to possession within three months or reasonable time of his vacating the premises and whether he committed a breach of that agreement?

(5) If so, to what damages is defendant entitled for such breach?

The Judge disallowed Issues Nos. 4 and 5, and found that the standard rent was Rs. 55 plus 10 per cent, total Rs. 60-8-0. On the facts proved before him, the Judge was of opinion that Rs. 40 paid by Ferdun or Ferdun's wife, when in occupation of the premises on January 1, 1916, was a concessional rent, and consequently, he was entitled to treat the rent paid under the lease of 1917 as the proper rent for the purposes of the Act.

Now it appears that Ferdun's wife was related to the plaintiff. Ferdun's business was not doing well; therefore the plaintiff, as the premises were vacant, let them to Ferdun at a lower rent than would ordinarily be charged. We think there was justification for the Judge holding that Rs. 40 was a concessional rent, and the cross-objections as to this finding must be disallowed.

The plaintiff, however, has appealed against the Judge's finding that he was not entitled to charge rent at Rs. 110, after the premises had been altered and improved, as he had not given proper notice under S. 7 of the Bombay Rent (War Restrictions) Act II of 1918. The plaintiff relied upon the letter written to the defendant of June 30, 1920, at p. 14, Part III. Under S. 7 (1) (a) :—

"Where the increase of rent is on account of such expenditure as is mentioned

in S. 4 [that is to say, expenditure on improvements and alterations], notice to increase the rent must be accompanied by a statement of the improvements or alterations effected and of their cost.

Now there is no statement in the letter of June 30, 1920, of the improvements or alterations effected to the premises occupied by the defendant. The statements of account annexed to the letter show that Rs. 58,473-6-0 had been spent on the building. But it is impossible to make out from those statements what were the actual improvements and alterations effected to the whole building, let alone what improvements or alterations were effected to the premises occupied by the defendant. We think the Judge was right in holding that the plaintiff could not seek to charge the defendant a higher rent on account of improvements and alterations effected to the premises in his occupation.

Then the next question was whether the plaintiff was entitled to recover a certain proportion of the Municipal rates and taxes paid by him after the rateable value had been increased. The plaintiff claimed to recover that amount irrespective of the Rent Act under S. 147 of the City of Bombay Municipal Act 1888. The learned Judge thought that that section must be read subject to the restrictions contained in S. 7 of the subsequent Bombay Act II of 1918, and this increase in assessment was not recoverable as increased rent from the tenant unless notice thereof had been given in accordance with the terms of that section. Therefore, he held that the plaintiff was not entitled to recover anything as increased rent or on account of the increase in the Municipal taxes, but was entitled to recover arrears of rent at the rate of Rs. 55 from November 1, 1918, to August 31, 1919, and Rs. 60-8-0 from September 1, 1918 to February 28, 1922. He passed a decree for that amount without making any order for the costs of the suit. The defendant's counter-claim was dismissed with costs.

We cannot agree with that decision. Under S. 147 (1) of the City of Bombay Municipal Act III of 1888 :—

"If any premises assessed to any property-tax are let and their rateable value exceeds the amount of rent payable in respect thereof to the person from whom, under the provisions of the last preced-

ing section, the said tax is leviable, the said person shall be entitled to receive from his tenant the difference between the amount of the property tax levied from him, and the amount which would be leviable from him if the said tax were calculated on the amount of rent payable to him."

That means that if the rent paid by the tenants is less than the rateable value, the landlord can recover from the tenant the tax which he has to pay on the difference between the rent payable by the tenant and the rateable value fixed by the Municipality. The right to claim from the tenant under S. 147 (1) payment of a certain portion of the Municipal taxes, which are primarily leviable under S. 146 of the Bombay Municipal Act from the lessor, has nothing whatever to do with the question of rent payable by the tenant.

In this case the defendant seeks to connect the plaintiff's claim to recover a portion of the taxes with S. 6 of the Bombay Rent Act, which says :—

"Where the landlord pays any Municipal rates, cesses, or taxes in respect of any premises, an increase of the rent thereof shall not be deemed to be an increase for the purposes of this Act if the amount of the increase does not exceed any increase in the amount for the time being payable by the landlord in respect of such rates, cesses or taxes over the amount paid in the period of assessment which included the first day of January 1916."

That section applies to an entirely different state of facts to that which was intended to be covered by the provisions of S. 147 of the City of Bombay Municipal Act. If a landlord seeks to increase the rent payable by the tenant, and if he can show that he is paying a higher amount for rates or taxes than he was paying on January 1, 1916, then, so far as his demand for an increase of rent is covered by the increased amount payable by him for rates and taxes, it will not be considered an increase of rent for the purposes of the Act.

So the question whether proper notice was given under S. 7 of the Rent Act does not arise in this case. The mention in the letter of June 30, 1920, of the probability of the Municipal taxes being increased is somewhat obscure, apart from being ungrammatical. But, at any

rate, it cannot be said that the plaintiff was seeking to charge an increased rent, because the tax was increased, and it may be inferred that he was seeking to recover the difference between the tax on the rateable value and the tax on the rent payable by the tenant. In any event, we think the plaintiff was entitled to take advantage of the provisions of S. 147 of the City of Bombay Municipal Act, and that the Rent Act did not apply, if plaintiff could show that the rateable value of the premises exceeded the amount of the rent payable in respect thereof by the tenant. It does not appear from the evidence that this point was sufficiently carefully considered when the evidence was being recorded, and its importance was only realized when the arguments of counsel were heard at the close of the case.

If the parties cannot agree on the excess amount which was paid by the plaintiff owing to the difference between the rateable value of the premises and the rent payable by the defendant, there must be a reference to the Commissioner to ascertain that difference before we can pass a final decree. We see no reason why the plaintiff should not be entitled to a portion of the costs of the suit, as it was at the defendant's instance that the suit was transferred to the High Court. Therefore the plaintiff will be entitled to three-fourths costs of the suit and the appeal. Plaintiff is entitled to the costs of the cross-objections.

Appeal allowed in part.

★ 1925 BOMBAY 534

MACLEOD, C. J. AND COYAJEE, J.

G. I. P. Railway Company—Appellants.

v.

Haji Tarmahomed Hasam—Respondent.

Second Appeal No. 762 of 1923, Decided on 24th June 1925, from the decision of D. J. at Broach, in Appeal No. 4 of 1922.

★ *Railways Act, S. 72—Risk-note B—Consignment—Missing of contents of some packages does not amount to loss of complete package.*

Where in a consignment under risk-note form B, the contents of some of the packages are missing, but all the packages are delivered, there is no loss of a complete package and the railway company is exempt from liability for the loss.

[P. 535, C. 1]

Binning instructed by Little and Co.—for Appellants.

G. N. Thakor and M. K. Thakore—for Respondent.

Macleod, C. J.—The plaintiff sued to recover Rs. 1,600 as the price of the contents of the plaintiff's tins of oil, with interest. The trial Court decreed the plaintiff's claim to the extent of Rs. 957. The appellate Judge increased the decretal amount to Rs. 1,189-12-9. The railway company have appealed. It is curious to note that in so many of these risk-note cases, the parties fail entirely to realize what are the real issues in the case, and in second appeal they endeavour to remedy the defects which have occurred in the proceedings in the Courts below. The third issue in the trial Court was: "Is the risk-note set up by the defendant railway company duly proved?" That was found in the affirmative. Then the second part of the issue was: "If so, are the defendants absolved from any liability?" Under the terms of the risk-note the defendants would only be liable, in any event, for the loss of a complete package or of a consignment consisting of a complete package or packages, and if a package or packages were missing, then the defendants would only be liable, if plaintiff could prove wilful neglect as mentioned in the risk-note. The trial Court held that the defendants were not absolved from liability, apparently on the ground that plaintiff had proved that the loss had occurred by wilful neglect of the defendants.

The question whether the defendants were liable at all, because they alleged that no complete package had been lost, does not appear to have been raised in the issues. The Judge really considered that the railway company were responsible for the oil that disappeared from the plaintiff's tins, and decreed the plaintiff's claim. There was no question also in the trial Court, whether there had been a deviation of the route, or whether the unloading or reloading of the tins at Wari Bunder by the defendants was unjustifiable.

In appeal, the same faults of procedure also occurred. The same issues were raised while the vital points in the case do not seem to have been discussed. It is difficult then to consider them, if they are questions of fact, in second appeal.

The first question really is whether any of the plaintiff's packages have been lost. We have been referred to the decision in

East Indian Railway Company v. Nilkanta Roy, (1) in which it was held that if in the case of tins of oil the tins are delivered, then there is no loss of a package even although the tins contain no oil when delivered to the consignee. The decision of Mr. Justice Fletcher to that effect depended on a decision of this Court, which has not been reported. However, we can quite understand how it came to pass that the railway companies asked the legislature to sanction a form of risk-note so as to absolve them from liability, except in the case of loss of a complete package. If a tin of oil disappears entirely, then undoubtedly it is lost. But a question would arise if the contents are partly lost and the tin is there, how much oil should be left in a tin so as to constitute delivery of the package. Other complicated questions might arise, and the solution of the difficulties was found by absolving the company from liability unless the package has disappeared entirely.

We have now got the decision of this Court in *B.B. & C.I. Railway Company v. Ambalal Sevaklal* (2) which says:—

"In this case we think it is quite clear that there has been no loss of a complete package forming part of the consignment. All the tins forming separate packages in the consignment were delivered to the consignee. The fact that all the contents of some of the tins were lost does not make the railway company liable under the terms of the Risk Note in Form B."

That therefore would dispose of the case unless it could be found that the defendants had committed a breach of their contract. It was never alleged that there was such a breach of the contract as to make the defendants liable, apart from the terms of the risk-note, for any loss of the goods, and, therefore, we are not in a position to say that the conduct of the defendants in unloading the goods at Wari Bunder and reloading them again, itself amounted to a breach of contract.

There is no question of deviation in this case because the goods came to Bombay, as they would ordinarily come to Bombay, and it would not make any difference if they were unloaded at Wari

Bunder and reloaded again for being carried on to B.B. & C.I. Railway line. On the question whether it would be more convenient from an administration point of view that the goods should go to Dardari instead of to Wari Bunder, there is no evidence, so that we are unable to hold that there is any foundation for saying that the company was guilty of a breach of contract under the terms of the risk-note.

We think that the decision of the Court below was wrong and the appeal will be allowed and the suit dismissed with costs throughout.

Appeal allowed.

1925 BOMBAY 535

FAWCETT AND MADGAVKAR, JJ.

Muljibhai Hirabhai Patel—IN RE.

Criminal Application for Revision No. 191 of 1925, Decided on 15th July 1925, against an order of Resident Magistrate, F. C., at Naidiad.

(a) *Criminal P. C.*, S. 195 (1) (c)—"Court" does not include Court in Native State.

The word "Court" in Cl. (c) of S. 195 (1) does not include a Court in a Native State such as Baroda State, 35 *Bom.* 139, *Ref.* [P. 535, C. 2]

N. P. Desai—for Applicant.

Fawcett, J.—In this case it is said that sanction is necessary for the prosecution of the applicant under S. 195 (1) (c), Criminal Procedure Code. This, however, assumes that the word 'Court' in that clause includes a Court in a Native State such as Baroda State. As at present advised, we do not think that that word can possibly be so construed, and we may refer to *Chanmalapa v. Abdul Vahab* (1) in support of this view. Obviously there is a difficulty in supposing that the legislature intended that complaints or sanctions should be made or issued by Courts not within the territorial jurisdiction of the legislature, but outside its control.

Madgavkar, J.—I agree. The opening words of S. 195, Criminal Procedure Code, "no Court shall take cognizance," clearly limit the meaning of the word 'Court' to British Indian Courts to which alone the British Indian Legislature could direct the prohibition which

(1) [1910] 85 *Bom.* 139=8 *I. O.* 645=12 *Bom.* L. R. 977.

(1) [1918] 41 *Cal.* 576=19 *O. W. N.* 95=22 *I. O.* 679=19 *C.L.J.* 142.

(2) [1909] Civil Application No. 198 of 1909.

follows in the section. It is, therefore, difficult to attach a wider meaning to the same word 'Court' in the remaining clauses of S. 195. Moreover, S. 1 limits the ambit of the Code to British India, and no reason is shown for widening the meaning of the Courts in British India to Courts in Native States, as is sought by the applicant. The application must, in my opinion, fail.

Application rejected.

★ 1925 BOMBAY 536

FAWCETT AND MADGAVKAR, JJ.

Basappa Rachappa Belkeri—IN RE.

Criminal Reference No. 21 of 1925, Decided on 2nd July 1925, made by the Dt. Magistrate, Bijapur.

★ (a) *Criminal P. C., S. 147 (2)—Proviso—Right not exercised in proper season due to obstruction by opposite side—Proviso does not apply.*

Where the non-exercise of the right within the proper period is due to circumstances beyond the control of the person claiming the right, the proviso to S. 147 (2) does not apply.

Where the right was not exercised in the proper season due to the obstruction of the opponents of the party claiming the right and to the latter resorting to the assistance of the Magistrate,

Held: that the proviso to sub-S. (2) did not apply. [P 537 C 1]

(b) *Criminal P. C., S. 147 (2) and (3)—Merely not passing order under sub-S. (2) does not justify order under sub-S. (3).*

The mere fact that the Magistrate cannot pass an order in favour of the petitioners under sub-S. (2) is no reason for passing an order in favour of the opponents, prohibiting the petitioners from any exercise of their alleged right. That is an order under sub-S. (3), which he could only pass, if it appears to him that the petitioners' right does not exist. The mere fact that they did not exercise the right during the preceding year is not sufficient to show that the right does not exist, and it only prevents the Magistrate from issuing an order under sub-S. (2) supporting the alleged right. [P 537, Cs. 1 2]

(c) *Criminal P. C., S. 147 (1)—Right to take religious car in procession along public road is covered by sub-S. (1).*

A right to take a car in procession along a public road to a temple is a right of user of land which falls within the scope of sub-S. (1) of S. 147. [P 537 C 2]

A. G. Desai—for Petitioner No. 2.

G. S. Mulgaonkar — for Opponents Nos. 2-6

Fawcett, J.—This is a reference by the District Magistrate of Bijapur asking us to cancel an order passed by the Sub-Divisional Magistrate, S. D. under S. 147, Criminal Procedure Code. The order in question arose out of a dispute as to the right of the Kurvinshetti Jadar residents of the village of Girsagar to take a car in procession along a public road to a temple. The Banajiger residents contend that it should not be allowed to go past their houses. An application was made by the first-named party to the Sub-Divisional Magistrate to order the other side not to interfere with the exercise of their alleged right. The Sub-Divisional Magistrate thereupon issued a preliminary order under S. 147, sub-S. (1), of the Code, and after hearing both the parties and the evidence led by them, he passed an order on February 26, 1925, prohibiting the Kurvinshetti Jaders from exercising their alleged right on the ground that they had not exercised it in the preceding year. The period in which this alteration should take place is from the first day to the fifth day after Shivratri Amavasya day. The Sub-Divisional Magistrate's order shows that evidence was given that the car procession did in fact take place during the preceding year but that this was on the ninth day after Shivratri day and not therefore between the first and the fifth day after that date. Accordingly he held that the applicants had failed to satisfy the condition laid down in the proviso to sub-S. (2) of S. 147, which says no order prohibiting interference with the exercise of the alleged right shall be made, unless where the right is exercisable only at particular seasons or on particular occasions, the right has been exercised during the last of such seasons or occasions before the institution of the inquiry. Mr. Desai for the Kurvinshetti residents has drawn our attention to documentary evidence on record, which shows that the reason why the car was not drawn between the first and the fifth day after Shivratri was obstruction by the other party. There is a petition to the District Magistrate complaining of this obstruction and mentioning that in consequence they desisted from the intended procession. The District Magistrate therefore gave an order to the local Sub-Inspector of Police to prevent any obstruction to the petitioners by the opponents at this procession. This order is

dated March 12, 1924, and presumably reached the Sub-Inspector a day or two later. The car was consequently not drawn in procession till March 14, being the ninth day after Shivratri. It is quite true that, if a very strict construction is given to the proviso in question, the mere fact that the car was not drawn within the proper period of five days prevents an order being passed in favour of the petitioners. But there can, I think, be no doubt that such a result could not have been intended by the legislature, and should not be accepted by this Court. The right would have been exercised during the last of the proper seasons before the institution of the inquiry, but for the obstruction of the opponents. The petitioners acted in a manner which deserves our approval, in desisting from the procession, which might have led to a breach of the peace, and promptly going to the proper authorities to obtain a removal of this obstruction. In the circumstances the non-exercise of the right within the proper period was due to the circumstances beyond their control, whereas the proviso obviously contemplates a non-exercise for reasons within the control of the persons claiming the right. Therefore in my opinion the Sub-Divisional Magistrate was not justified in holding that the right had not been exercised during the preceding year so as to bring the case within the proviso to sub-S. (2), and that appears to me to be sufficient ground for cancelling his order in favour of the opponents. Though the occasion for an order has now passed and the dispute is suspended till March next year, on the other hand, if the order is allowed to stand, it will unduly prejudice the petitioners in any future proceedings of the same kind. I think, therefore, there is good ground for our interference.

Again the mere fact that the Magistrate, if his view was right, could not pass an order in favour of the petitioners under sub-S. (2) affords no reason why he should have passed an order in favour of the opponents, prohibiting the petitioners from any exercise of their alleged right. That is an order under sub-S. (3), which he could only pass, if it appeared to him that the petitioners' right did not exist. Obviously the mere fact that they did not exercise the right during the preceding year is not sufficient to show

that the right does not exist, and it only prevents the Magistrate from issuing an order under sub-S. (2) supporting the alleged right.

The District Magistrate in the reference to this Court has submitted that in any case the Sub-Divisional Magistrate could not legally pass an order in this case under S. 147 of the Code, and he cites a decision of this Court in *Queen-Empress v. Madhavdas* (1). If, however, that case is looked at, it is obvious that this Court did not say that in no case could an order prohibiting a procession along a street be passed under S. 147, Criminal Procedure Code. All that it did say was that in that particular case the Magistrate had not come to any finding as to the right in dispute, and therefore there was no foundation for the order that he purported to pass under S. 147. It is not now necessary for us to decide whether such an order can or cannot be passed under S. 147, but, as at present advised, I can see no sufficient reason for holding that a right of the kind in question is not a right of user of land, which falls within the scope of sub-S. (1) of S. 147, Criminal Procedure Code.

I would, therefore, cancel the order of the Sub-Divisional Magistrate prohibiting the Kurvinshetti Jaders from exercising their alleged right. It is not necessary for us to substitute any other order as the occasion has passed; but this is of course without prejudice to the petitioners having resort to any remedies which are legally open to them under the Criminal Procedure Code, in order to remove any threatened obstruction to the car procession next year or any other future years.

Madgavkar, J.—I agree. The Sub-Divisional Magistrate's order should, in my opinion, be set aside on three grounds; (1) The delay of a few days in exercising the right last year due to the obstruction of the opponents, and the petitioners' recourse to the District Magistrate is not the absence of the exercise contemplated in the proviso; (2) the order of the Magistrate goes too far; it not merely refuses the petitioners' application but without a corresponding application on the part of the opponents gives an order in their favour; (3) apart from the allegation of prejudice to their dharma the opponents had not shown how they being Hindus, and possibly

(1) [1891] Rat. Unrep. Cr. C. 548.

Shaivas, maintain a right of obstructing merely because their houses lie along a certain portion of the route of the procession.

Order cancelled.

★ 1925 BOMBAY 538

MACLEOD, C. J., AND COYAJEE, J.

Municipal Corporation of Bombay—Appellant.

v.

Ranchordas Vandravandas and others—Respondents.

O. C. J. Appeal No. 45 of 1925, Decided on 13th July 1925, against the decision of Shah, J., in Civil Suit No. 2413 of 1923.

★ (a) *Land Acquisition Act (1 of 1894), S. 6 (3)—Provision that the notification under sub-S. (3) is conclusive evidence of the sanction of the scheme does not disentitle a claimant to get a declaration that the Board acted ultra vires in framing the scheme.*

Whenever the Local Government does sanction an improvement scheme, there is a duty to announce the fact by notification and the publication of a notification is conclusive evidence that the scheme has been duly framed and sanctioned. This provision does not affect the right of the claimant to institute a suit to have it declared that the Board in framing the scheme acted ultra vires. 47 Cal. 500 (P. C), Foll. [P. 510, C. 2]

(b) *Bombay City Municipal Act (1888), S. 63 (k)—Building quarters for Municipal servants is for promoting public convenience—Such a matter is within the discretion of the Municipality and Court of law cannot interfere.*

The building of quarters for Municipal servants should be held to be a measure likely to promote public convenience. The matter lies within the discretion of the Municipal Commissioner and Corporation and a Court of law cannot interfere with the exercise of that discretion. [P. 511, C. 1]

(c) *Bombay City Municipal Act (1888), S. 63. (k)—Contemplation by Municipality for utilization of the ground floor for shops cannot disentitle it from proceeding with the scheme.*

Where the Municipality had in contemplation the utilization of the ground floor of the premises to be built upon the area in suit as shops.

Held; that there was no sufficient ground for holding that the Municipality could not proceed with the scheme. [P. 512, Cs. 1 & 2]

Coltman and Diphtry—for Appellant.

Chimanlal Setalvad and Kemp—for Respondents.

Macleod, C. J.—Plaintiffs Nos. 1 to 5 in this suit are the trustees of the Tulsidas Gopalji Charitable Trust. As

such trustees they are in possession of certain immoveable property which Defendants Nos. 2 and 3 desire the Government of Bombay to acquire for them under the provisions of the Land Acquisition Act I of 1894. Plaintiff No. 6 is in occupation of a portion of the property as the lessee from Plaintiffs Nos. 1 to 5.

The plan of the land appears at p. 23 of the print. The land marked yellow was acquired by the Corporation in or about the year 1917 for certain purposes including the building of a primary school. It does not seem, however, that up to now the Corporation has proceeded with the construction of the school. On September 27, 1920, the Municipal Commissioner addressed a letter to the Corporation which appears at p. 23A of the print:—

“I have the honour to refer to Corporation Resolution No. 1609, dated June 14, 1915, approving of the acquisition of a site for the construction of the primary school at Mazagaon and to state that after further enquiries the site proposed has been found to be inadequate for the needs of primary education in this locality. On making enquiries as to how this difficulty could be remedied, Mr. Mackison has come to the conclusion that the area in question to the east of Mazagaon Road is at present very badly developed, and furnished an opportunity not only for the construction of school accommodation but for development as quarters for Municipal servants and the provision of a public park. I attach a plan, No. 67, of August 12, 1920, showing the existing site already acquired for the primary school, and Mr. Mackison's proposed development. I do not think that this development can be considered to be final, but there is no doubt that an opportunity exists for acquiring land in this locality at a reasonable rate to meet several Municipal needs. The Corporation, in their Resolution No. 4775, dated September 15, 1919, have requested us to expedite the submission of proposals for the housing of certain of the Municipal servants. The locality in question would be very suitable. As I have already stated the land is at present very badly developed and the present lease will expire in a few years.

It is estimated that the total cost of the land with the quarters to be constructed thereon will be approximately

Rs. 23½ lakhs. From the development as proposed by Mr. Mackison, it is anticipated that it would be possible to provide a public park and the play ground for the school and still to derive a return of about four per cent. on the capital outlay. The development suggested provides eighty-four shops and one hundred and twenty-six quarters of four rooms each. The area to be acquired is 27,213 square yards which, with the area already acquired 2,225 square yards, will give a total area of 29,438 square yards. It is estimated that the number of people to be dishoused will be three or four hundred, whereas accommodation would be provided by the proposed development for about 750 people in addition to the school and the park.

As already stated I am not entirely satisfied that the development proposed is the best suited to the locality; but I am emphatically of opinion that the land in question should be acquired for development as a Municipal estate comprising a school and a playground, quarters for Municipal servants and a public recreation ground. The details to be laid out can be adequately arranged at a subsequent date after full discussion.

I, therefore, request the sanction of the Standing Committee and the Corporation to the acquisition of an area of approximately 27,213 square yards on the east side of Mazagaon Road between Dockyard Road and Matharpakhady Road and to my making an application to Government for the acquisition under the Land Acquisition Act of the area mentioned above."

The said letter was thereafter referred to, and considered by the Roads Committee and eventually the Municipal Commissioner addressed a letter to Government on March 28, 1922, which appears at p. 16 of Part III of the print:—

"I have the honour to state that the Standing Committee have authorized me to apply to Government for the acquisition under the Land Acquisition Act of the property bearing N. S. No. 3607 at Mazagaon and Dockyard Roads shown in crimson colour on the accompanying plan marked J. M. F. /3607 (in duplicate) in connexion with its development as a Municipal estate comprising a school, a playground, quarters for Municipal servants, etc.

I request that Government will be pleased to take necessary steps in the

matter and place me in possession at as early a date as practicable.

The usual draft notification under S. 4 in duplicate is herewith forwarded."

A notification was thereafter published under the provisions of S. 4 of Act I of 1894. On June 27, 1922 a notification under S. 6 of the Land Acquisition Act was published. The preamble states:

"Whereas it appears to the Governor in Council that land is required to be taken by Government at the expense of the Municipality of Bombay for a public purpose, viz., the development as Municipal estate comprising a school, a playground, quarters for Municipal servants, etc., it is hereby declared that for the above purpose the following plots of land are to be acquired in the aforesaid city of Bombay."

The plaintiffs' solicitors then wrote to the first defendant complaining about the property being acquired by the Municipality "under the guise of a public purpose, not in the interests of the inhabitants of the neighbourhood, but with a view to profiteering." Similar letters were written to the Corporation and to the Municipal Commissioner. On September 18, 1922, a notice was given that the plaintiffs intended to institute a suit against the Secretary of State for India in Council and the Municipality of Bombay.

On June 21, 1923, the plaintiffs filed this suit praying that it might be declared that all the proceedings taken in connexion with the acquisition of the property were invalid and of no effect, and that the defendants, their officers or agents forthwith pending the hearing of the suit and thereafter permanently be restrained from taking any further steps to acquire possession of the property. The plaintiffs contended that the second and third defendants had no power to acquire the property for the purpose for which they proposed to acquire the same. In particular they had no power to acquire the property for the purpose of: "(a) erecting quarters for the accommodation of Municipal servants; (b) erecting shops to be let out on hire for profit; and (c) recoupment of expenses incurred in the acquisition of other land acquired or to be acquired for legitimate purposes."

Defendants Nos. 2 and 3 have put in their written statement, and the real

defence to the plaintiffs' claim is contained in para. 10 thereof :

"Referring to para. 9 of the plaint these defendants without prejudice to the contention contained in para. 9 hereof, deny each and every contention contained in the said para. and say that they have power to acquire land for the purposes therein mentioned. These defendants say further that in fact the purposes (b) and (c) mentioned in the said para. are not mentioned in the said declaration which states the purposes for which the said land is required. These defendants deny that they in fact propose to acquire the said land for the said purposes (b) and (c). The erection of shops, if within the powers of the second defendants (as they say it is) is merely incidental to the said proposed scheme. These defendants say further that the second defendants would in any event be entitled to use the said land for any purpose for which the Municipal Act authorized its use although such purpose was not that mentioned in the said declaration."

Defendants Nos. 1 and 4 have filed their written statement, their main contention being that by reason of S. 6 (3) of the Land Acquisition Act, 1894, the said declaration is conclusive evidence that the land is needed for a public purpose and the plaintiffs are debarred from alleging the contrary.

Numerous issues were raised at the hearing. A large number of them were purely on technical points which the defendants might well have conceded. On Issues Nos. 2 and 7, whether the suit was maintainable as against all the defendants, viz., 1 to 4, the learned Judge held that the suit was maintainable in spite of S. 6, Cl. (3), of the Land Acquisition Act; it even seems to have been conceded before the learned Judge by the defendants that the suit was maintainable. However in any event it is perfectly clear there is nothing in the point.

In *Amulya Chandra Banerjee v. Corporation of Calcutta* (1), a suit was brought for a declaration that the Municipality of Calcutta was not competent according to law, to acquire certain land in Calcutta, the property of the appel-

lants. The District Judge held that the declaration made by the Governor on September 6, 1915, under the Land Acquisition Act, that the land was required for a public purpose was conclusive against the plaintiffs. On appeal to the High Court a different opinion was expressed by the Judges in appeal. They considered that the declaration of the Governor under S. 6 (3) of the Land Acquisition Act was not conclusive. The case went to the Privy Council, but the point does not appear to have been argued before their Lordships. It may be presumed that it was thought that the point was not worth arguing.

But in *Trustees for the Improvement of Calcutta v. Chandra Kanta Ghosh* (2), the point does seem to have been taken, and at p. 506 (47 Cal.) there is the following passage :

"Whenever the Local Government does sanction an improvement scheme, there is a duty to announce the fact by notification, and the publication of a notification is conclusive evidence that the scheme has been duly framed and sanctioned. This provision does not affect the right of the respondent to institute a suit to have it declared that the Board in framing the scheme acted ultra vires or that the schemes as sanctioned does not authorize the appellants to acquire by compulsion the land in question."

It was open then to the plaintiffs to seek the declaration they ask for in the suit. If the Corporation were not empowered by the provisions of the City of Bombay Municipal Act, 1888, to acquire the land in suit, then the plaintiffs would be entitled to the injunction they asked for. The learned trial Judge has held that the Municipality were empowered by the provisions of S. 63, Cl. (k) to acquire land for the purpose of building quarters for municipal servants, as that was a measure likely to promote public safety, health, convenience or instruction.

That question also arose in the case just referred to, viz., *Amulya Chandra Banerjee v. Corporation of Calcutta* (1). There the Municipality desired to acquire surplus land for the purpose of erecting, at the expense of a private benefactor, a

(1) 1922 P. C. 333=49 Cal. 838=49 I. A. 255=16 M. L. W. 673=31 M. L. T. 155=43 M. L. J. 634=27 C. W. N. 125=21 A. L. J. 27=37 C. L. J. 67 (P. C.).

(2) [1919] 47 Cal. 500=11 L. W. 566=38 M. L. J. 511=18 A. L. J. 521=22 Bom. L. R. 586=32 C. L. J. 65=56 I. C. 32=24 C. W. N. 881 (P. C.).

dharmasala for the use of the numerous worshippers resorting at certain seasons of the year to a Hindu temple within the area of the improvement scheme. Their Lordships said (p 544):—

"The construction and maintenance of a dharmasala cannot be said to be ruled out of S. 14 (xi), which covers 'any other matter which is likely to promote the public health, safety or convenience, or the carrying out of this Act.' This being so, their Lordships would be the last to question the opinion of, or the exercise of discretion by, the Municipality of Calcutta, even if they differed from it, which they certainly do not. The Act by S. 14 and S. 556 has expressly placed the discretion, not with this Board or with a Court of law, but with the Municipality itself. The Corporation has the power of acquisition of land which may in their opinion be needed for carrying out any of the purposes of the Act."

The grounds on which the Municipal Commissioner considered that the land in suit should be acquired for the purpose of housing Municipal servants appear in his letter of July 23, 1919 : see Exhibit 1. We agree with the trial Judge that the building of quarters for Municipal servants should be held to be a measure likely to promote public convenience. In any event, if the Municipal Commissioner and the Corporation think that such measure is likely to promote public convenience, the matter lies with in their discretion, and it would not be for a Court of law to interfere with the exercise of that discretion.

The only other point in the case is whether the fact that the Municipal Commissioner had recommended that a portion of the land so acquired should be built upon, not only for the purpose of providing quarters for Municipal servants, but also for providing shops, was a sufficient ground for saying that the whole object of the Corporation in acquiring this land was contrary to the provisions of the Act. The learned Judge on this question said :—

"It is not suggested before me and cannot be suggested that it is open to the Corporation to acquire land to put up shops with a view to earn any dividend or interest on the outlay. It is urged, however, that here the purpose of acquisition is different, and that the putting up of shops is merely incidental to

it. After a careful consideration of this argument, I have come to the conclusion that the putting up of eighty-four shops would not be merely an incidental thing. It was a part of the scheme which was supposed to reduce the burden of a heavy outlay in building quarters for Municipal servants and in acquiring the property. Indeed, as suggested by the Municipal Commissioner in his letter of September 27, 1920, it may be possible to alter the scheme after the whole land is acquired and even to make it more profitable. But on the record as it stands I am clear that the putting up of eighty-four shops is a substantial part of the development scheme for which this land is acquired. The public body which is given powers to acquire land for the purposes of the Act must be properly confined to the limits of those powers, and cannot be allowed to exceed the same by treating acquisition of land for shops as merely incidental to the main scheme. In other words when the acquisition of an area is based upon the development scheme which contemplates an appreciable part thereof to be put to use not permissible under the Act, the acquisition cannot be justified. It is possible for the Corporation to require the whole or a part of this area for school, recreation ground and building quarters for Municipal servants, so far as they reasonably and bona fide require it for those purposes only. But the present acquisition is for the purpose of developing it as a Municipal estate not only for purposes for which it is permissible to the Corporation to acquire land but also for a purpose for which it is not permissible to the Corporation to acquire any land. It is not possible to say how much of the acquired land would be put to such use. It is sufficient to say that the putting up of shops which could be let to the public on rack rent is a substantial part of the scheme for which the land is required by the Municipality and would take up an appreciable area of the land acquired. No decided cases bearing on this point have been cited before me, and I have to decide the question with reference to this acquisition on the particular facts before me. Whether the shops come in incidentally in the whole scheme or form a real and practical basis of the whole scheme, it is undoubtedly a part, and in my opinion a substantial part, and by no means a negligible part, of the

scheme ; and I do not see how, under the cover of acquisition for recognized purposes, any land could be acquired for a purpose not recognized by the Municipal Act."

The result was that a decree was passed in favour of the plaintiffs, and it was declared that all the proceedings taken by Defendants Nos. 2 and 3 in connexion with the application of the property in suit were invalid and of no effect, and that Defendants Nos. 2 and 3 were restrained permanently from taking any further steps to acquire possession of the property under the declaration dated June 27, 1922.

Now it will be seen from the plan on p. 23 what part of the area to be acquired was intended to be built upon to provide quarters for Municipal servants. It was contended for the appellants that merely because the Municipality had in contemplation the utilization of the ground floor of the premises to be built upon that area as shops there was no sufficient ground for holding that the Municipality could not proceed with the scheme and could not be allowed to ask Government to continue the proceedings under the Land Acquisition Act. We cannot agree with the conclusion of the learned Judge that because the Commissioner and the Corporation contemplated building these shops, that was a substantial part of the scheme, or, as the learned Judge has in effect held, a part of the scheme on which the whole of the acquisition proceedings depended, so that the acquisition of this large area was entirely outside the powers of the Corporation. It may be inferred from the Municipal Commissioner's letter of September 27, 1920, that the rents which were expected to be collected from the tenants of the shops on the ground floor would be higher than the rents of the same premises if they were occupied for living purposes by Municipal servants. But the only result of the ground floor premises being occupied by Municipal servants would be that the return on the capital outlay would be less. It is really a matter of administration for the Corporation to decide, when the land has been acquired and the plans for providing quarters for Municipal servants have been made out, whether a certain portion of the premises can be more conveniently let out for other purposes. That is a

matter which has to be decided when the land has been acquired, and the mere fact that the provision of shops is contemplated would not be sufficient, in our opinion to invalidate the whole scheme.

That really is the main question in the appeal. There is no necessity for us to deal with the other points that arise from the remaining issues which were considered by the learned Judge. There are twenty-four grounds in the memorandum of appeal, and the learned counsel who argued the case for the appellants has wisely touched upon only those with which we have dealt. It would be better in a case of this description if technicalities were avoided, as much time would be saved thereby.

The appeal will be allowed and the suit dismissed with costs throughout. One set of costs allowed. Cross-objections dismissed with costs. The Taxing Master can tax the costs of Issues Nos. 1, 2, 3, 6 and 7 which are decided against the defendants, and the plaintiffs will be entitled to the costs of those issues.

Appeal allowed.

1925 BOMBAY 542

MACLEOD, C. J., AND COYAJEE, J.

Vagha Jesang and others—Applicants.

v.

Jagjivan Amritlal Desai and others—Opponents.

Civil Application for Revision No. 294 of 1924, Decided on 24th June 1925, from the order of the Sub.-J. of Godhra in Small Cause Suit No. 437 of 1923.

Landlord and Tenant—Suit for enhanced rent for excess land—All cosharer landlords must join—Civil P. C., O. 1, R. 1.

Where the tenants have been paying certain rent in past years for the land in their occupation, it is not open to one cosharer to file a suit seeking to recover from them greater amount of rent than has been paid in the past. Whether the claim made is one for enhanced rent, or a claim for rent for excess land taken in occupation by the tenants, the principle is the same, that the question must not be at the mercy of one sharer, but must be decided between the tenants and the whole body of sharers entitled to claim rent as landlords. [P. 543 C. 1]

R. W. Desai—for Applicants.

H. M. Mehta—for Opponents.

Macleod, C. J.—These are applications entertained under S. 25 of the Provincial Small Cause Courts Act in suits filed by the Desais of the village of Vinzol. The plaintiffs were not entitled to claim the whole of the rent. They are sharers to the extent of fourteen annas and seven and a half pies. The sharer entitled to the balance is not a party to the proceedings. The plaintiffs are claiming their share of what is payable by the tenants, at a higher amount than has been paid in the previous years, on the ground that although the bigha in these cases may be the same, the tenants are liable to pay additional rent for certain excess land in their occupation. It would not, therefore, be, strictly speaking, a suit for enhanced rent, but merely a claim that the tenants should pay the proper rent for the lands they are cultivating, the rate itself being admitted. But since these tenants have been paying certain rents in past years for the land in their occupation, it is not open to one cosharer to file a suit seeking to recover from the defendants a greater amount of rent than has been paid in the past. Whether the claim made is one for enhanced rent, or a claim for rent for excess land taken in occupation by the tenants, the principle is the same, that the question must not be at the mercy of one sharer, but, if at all, must be decided between the tenants and the whole body of sharers entitled to claim rent as landlords.

On these grounds we think the Judge was wrong in entertaining the claim of the plaintiffs who were entitled to only fourteen annas and seven and a half pies share of the increased rent from the defendants. The defendants would still be liable to pay the balance of the rent to the cosharer, and again they might be harassed by a claim for more rent on some entirely different principle. If higher rents are to be asked for, then they can only be asked for by the whole body of sharers: see *Balakrishna v. Moro* (1).

We, therefore, make the rule absolute and amend the decree by directing that the amounts admitted by the defendants as due to the plaintiffs for rent be substituted for the amounts decreed. The applicants will be entitled to their costs of the rule in all these applications.

Rule made absolute.

(1) (1897) 21 Bom. 154.

1925 BOMBAY 543

TARAPOREWALA, J.

Naginlal Maganlal Jaichand, IN R.
and

Gunvantrai Dhirajlal Desai—Ex parte.
Insolvency Case No. 322 of 1925,
Decided on 22nd June 1925.

(a) *Civil P. C., S. 24—High Court in insolvency jurisdiction cannot withdraw insolvency proceedings pending with a Sub-Judge in the presidency—Presy. Towns Insol. Act (1909), S. 18.*

The High Court in the exercise of its insolvency jurisdiction has no power to order a withdrawal of the proceedings in insolvency from the Court of the Subordinate Judge in the presidency to itself. [39 Bom. 604 Appr.] But in the exercise of the jurisdiction of the High Court in insolvency a Judge invested with that jurisdiction has power under S. 18 to stay any suit or other proceeding pending against the insolvent in a District Court or Subordinate Judge's Court in the Presidency which is subject to the superintendence of the High Court. 1922 Bom. 330 Expl. and Dist. [P 545 C 1]

(b) *Presy. Towns Insol. Act (1909) S. 22—Section enables staying its own proceedings and not of another Court.*

Section 22 enables the Court to stay its own proceedings and not to order some other Court to stay proceedings and the powers are exercisable on the Court being satisfied that insolvency proceedings are pending in any other British Court and that the property of the debtor could be more conveniently distributed by such Court among his creditors. [P 546 C 1]

Jinnah—for Petitioning Creditors.

Chimanlal Setalvad—for Official Liquidator.

Taraporewala, J.—The executor of the petitioning creditor in this insolvency proceeding has taken out this notice of motion against the First Class Subordinate Judge, Ahmedabad, and three other persons being the receivers of the estates of the insolvents appointed by the First Class Subordinate Judge, Ahmedabad, in insolvency proceedings pending in the said Court, and Mr. Shivdasani, the liquidator of the Whittle Spinning and Manufacturing Company, Ltd., for an order: (a) either to transfer or stay the proceedings in the Court of the First Class Subordinate Judge at Ahmedabad and order the receivers appointed by the First Class Subordinate Judge at Ahmedabad to hand over all the assets effects, papers, vouchers, information collected, etc., to the Official Assignee of Bombay subject to the payment of such allowance, if any, as to this Court may seem right to.

be made to the said receivers out of the estate of the said insolvents come into their hands; or (b) to direct the First Class Subordinate Judge's Court at Ahmedabad requesting the said Court to act merely in aid of this Honourable Court and auxiliary thereto in administering the estates of the said insolvents, and in the meantime for an order against the said receivers to the effect above mentioned; and for such other directions as to this Court may seem right.

This application was opposed by Mr. Shivdasani who appeared by counsel.

The facts relevant to the present notice of motion are as follows:—

A petition was presented in the Court of the First Class Subordinate Judge, Ahmedabad, for adjudicating all the three persons, who have been adjudicated insolvents in the proceedings before this Court, insolvents under the Provincial Insolvency Act. On the said application the First Class Subordinate Judge of Ahmedabad made orders on February 18 and 19, 1925, appointing Respondents Nos. 2, 3 and 4 as provisional receivers respectively of the estates of the three insolvents. Before the final order of the adjudication, however, was made by the Court at Ahmedabad a petition was presented in this Court by the petitioning creditor for adjudicating the said three persons insolvents, and an order of adjudication was made on the said petition by this Court on March 9, 1925. Thereafter, on March 21, 1925, the Ahmedabad Court made a final order adjudicating the said three persons insolvents. An application was made to this Court for stay of the proceedings in this Court under S. 22 of the Presidency Towns Insolvency Act on the ground that the insolvency proceedings were pending in the Ahmedabad Court and that it would be more convenient for that Court to proceed with the insolvency proceedings. The said application was heard by Mirza, J. in the vacation and dismissed by him. I am told that the petitioning creditor in the Ahmedabad Court, Mr. Shivdasani, has appealed against the said order of Mr. Justice Mirza and the said appeal is pending. I was further told by counsel for Mr. Shivdasani that the petitioning creditor in this Court had applied to the First Class Subordinate Judge at Ahmedabad to stay the insolvency proceedings before him under S. 36 of the Provincial

Insolvency Act on the ground that this Court had refused to stay the proceedings pending before it in insolvency against the said insolvents, and that the proceedings would be more conveniently carried on in this Court, and that the Ahmedabad Court dismissed the application and refused to stay the proceedings pending before it. The executor of the petitioning creditor in this Court has now applied by the present notice of motion for transfer or stay of the insolvency proceedings in the Ahmedabad Court.

There is thus in a way an impasse. The receivers appointed by the Ahmedabad Court are collecting the assets of the insolvents under the orders of the Ahmedabad Court and the Official Assignee of Bombay is at the same time entitled to collect the assets, the same having vested in him under the order of adjudication passed by this Court, and there is no doubt that it would be in the interest of all the parties concerned that the insolvency proceedings should be carried on in one or other of these two Courts.

The question before me is whether, under the circumstances, I have got the jurisdiction to order either a transfer or a stay of the insolvency proceedings pending in the Ahmedabad Court.

Mr. Jinnah for the petitioning creditor contended that under S. 90 of the Presidency Towns Insolvency Act this Court has the like powers, and has to follow the like procedure, as it has and follows in the exercise of its ordinary original civil jurisdiction, and that under S. 24 of the Civil Procedure Code the Court has power to withdraw any suit, appeal or either proceeding, pending in any Court subordinate to it, and try or dispose of the same. As pointed out by me in the course of the argument, it has been held by a Full Bench of this Court in *Narayan Vithal Samant v. Jankibai* (1) that the powers under S. 24 of withdrawal can be exercised by the Judge sitting on the appellate Side of this Court only and not by a Judge sitting on the Original Side of the High Court. The powers of the Insolvency Court given thereto under S. 90 of the Presidency Towns Insolvency Act, being only such powers as are exercised by his Court in the exercise of its ordinary original civil jurisdiction, the power of transfer or with-

(1) [1915] 39Bom. 604=30 I. C. 560=17 Bom. L. R. 655 (F. B.)

drawal is necessarily not one which is delegated to this Court under S. 90 and is, therefore, not one which this Court can exercise.

Mr. Jinnah relied upon the decision in *Srinivasa Aiyangar v. The Official Assignee of Madras* (2). There the learned Judges assumed that the Judge sitting on the Original Side could exercise the powers under S. 24 of the Civil Procedure Code. Therefore the decision is of no value in this matter.

I hold that I have no power as a Judge in insolvency to order a withdrawal of the proceedings in insolvency from the Court of the Subordinate Judge at Ahmedabad to this Court.

Mr. Jinnah then contended that in any event under S. 18 of the Presidency Towns Insolvency Act this Court had power to stay the insolvency proceedings in the Ahmedabad Court. The section, in my opinion, is not very happily worded. The corresponding section in the English Bankruptcy Act of 1914 is S. 9. It runs as follows :

"9. (1). The Court may, at any time after the presentation of a bankruptcy petition, stay any action, execution, or other legal process against the property or person of the debtor, and any Court in which proceedings are pending against a debtor may, on proof that a bankruptcy petition has been presented by or against the debtor, either stay the proceedings or allow them to continue on such terms as it may think just."

The wording of S. 9 of the English Bankruptcy Act would clearly not include insolvency proceedings which may be initiated by the debtor himself or by his creditors.

The object of S. 9 of the English Bankruptcy Act and of S. 18 of the Presidency Towns Insolvency Act is really to protect the property and person of the insolvent from any action, execution or other legal process, against him and to ensure the proper administration and distribution of his estate among the creditors.

Looking at S. 18 itself, I am of opinion that the wording thereof is more consistent with the interpretation that insolvency proceedings are not included under that section. The sub-C. (1) gives the power to this Court to stay any suit or other proceedings pending against the

insolvent in any Court. Now, insolvency proceedings could only be pending before the Judge exercising insolvency jurisdiction in the High Court. Therefore, any suit or other proceeding, so far as the Judge or Judges of this Court are concerned, must necessarily mean suit or other proceeding other than an insolvency proceeding. As to insolvency proceedings this Court is empowered to stay them under S. 22 in its own Court.

Coming to sub-C. (2) of S. 18, which provides for the service of the order made under sub-C. 1, it directs that the order may be served on the plaintiff or other party prosecuting such suit or proceeding. Now, in the insolvency proceedings, there is neither the plaintiff nor any party prosecuting the proceeding immediately after the adjudication order is made. It is the Court that administers the estate of the insolvent, and the Official Assignee who takes all the necessary steps for collecting the estate of the insolvent and distributing the property among the creditors. There is no party which can be said to prosecute the proceedings. There is no doubt that when the petition is presented by the creditor, so far as the hearing of the petition and making of the order is concerned, he is a party thereto prosecuting the said petition. But immediately an order of adjudication is made, he is no longer a party prosecuting the proceedings under such order although he is entitled to appear under certain circumstances before the Court and ask for directions just as any other creditor is entitled to do.

Had the insolvency proceedings been included under S. 18, one would have found some provision in sub-C. (2) for service of the order made under sub-C. (1), on a receiver of the insolvent's estate appointed by any other Court exercising jurisdiction in insolvency. In my opinion, the wording of sub-C. (2) is consistent only with the construction that insolvency proceedings are not included under S. 18.

The provision as to service of the order staying any action or proceeding under the English Bankruptcy Act is contained in S. 9, sub-C. (2), and is identical with the provision under S. 18, sub-C. (2), of the Presidency Towns Insolvency Act.

This point is also made clear by looking at the other sections of the Presidency

(2) [1918] 38 Mad 472=14 M. L. T. 184=25 M. L. J. 299=(1919) M. W. N. 1014=21 I. C. 77=(1914) M. W. N. 45.

Towns Insolvency Act, the Provincial Insolvency Act, and the English Bankruptcy Act. S. 22 of the Presidency Towns Insolvency Act specifically provides for stay of insolvency proceedings in one Court when they are pending in more Courts than one. That section enables the Court to stay its own proceedings and not to order some other Court to stay proceedings, and the powers are exercisable on the Court being satisfied that insolvency proceedings are pending in any other British Court and that the property of the debtor could be more conveniently distributed by such Court among his creditors. No doubt, an application was made under that section to this Court to stay the proceedings pending in this Court and this Court refused to do so. It merely means that in the exercise of the discretion given under S. 22, this Court thinks that the other Court in which the insolvency proceedings are pending would not be able more conveniently to distribute the property of the debtor.

Then coming to the Provincial Insolvency Act, it appears that the District Courts and the Courts subordinate thereto, which exercise insolvency jurisdiction under S. 3 of the Provincial Insolvency Act, have not been given a power to stay any suit or other proceeding pending against the insolvent in any other Court, but it is provided by S. 29 that any Court in which the suit or other proceeding is pending should, on proof of proceedings under the Provincial Insolvency Act, either stay the proceedings or allow it to continue on such terms as the Court may think fit. However, S. 22 of the Presidency Towns Insolvency Act is reproduced in S. 36 of the Provincial Insolvency Act, and the District Courts are given the same powers to stay their proceedings on proof of pendency of insolvency proceedings in another Court against the same debtor and that property of the debtor could be more conveniently distributed by such other Court. The reproduction of S. 22 of the Presidency Towns Insolvency Act in the Provincial Insolvency Act shows that the insolvency proceedings are considered on a different footing from a suit or other proceeding pending against the insolvent and therefore they are treated separately by separate sections.

It is to be noted that under the English Bankruptcy Act insolvency jurisdiction is given both to the High Court and to the

County Courts. By S. 105, sub-Cl. (2) of the English Bankruptcy Act it is specifically provided that a Court having jurisdiction under the Act shall not be subject to be restrained in the execution of its powers under the Act by the order of any other Court, nor shall any appeal lie from its decision except in manner directed by the Act.

Section 100, sub-Cl. (2), provides for transfer of proceedings in bankruptcy from one Court to another as follows :—

"Any proceedings in bankruptcy may at any time, and at any stage thereof, and either with or without application from any of the parties thereto, be transferred by any prescribed authority and in the prescribed manner from one Court to another Court, or may, by the like authority, be retained in the Court in which the proceedings were commenced, although it may not be the Court in which the proceedings ought to have been commenced."

By S. 172 it is provided that the Lord Chancellor may with the concurrence of the other Lords make general rules for carrying into effect the objects of the Act provided that the general rules so made shall not extend the jurisdiction of the Court.

The Bankruptcy Rules of 1915 made under the powers so given provide by Rules 18 to 25 for the transfer of insolvency proceedings from one Court to another.

The English Bankruptcy Act thus makes it quite clear that S. 9 thereof, on which S. 18 of the Presidency-Towns Insolvency Act is based, does not empower the Court exercising the insolvency jurisdiction to stay proceedings in insolvency pending in any other Court.

On all these considerations, I have come to the conclusion that S. 18 does not empower me in the exercise of insolvency jurisdiction to stay insolvency proceedings in the Ahmedabad Court.

Although in the course of the argument counsel stated to me that they had not found any decision on the construction of S. 18, I have found that there is one given by Mr. Justice Marten *In re Maneckchand* (3). Mr. Justice Marten came to the same conclusion and held that S. 18 did not empower this Court to stay proceedings in insolvency in any other Court. Mr. Justice Marten held that the words "other proceeding" in S. 18 should be

ejusdem generis or analogous to a suit. He, however, put his judgment on another ground, namely, that the District Court was not subject to the superintendence of the Commissioner in Insolvency and that consequently on that ground alone S. 18 was not complied with. With great respect to the learned Judge, I do not agree with him on this point. If the said construction was correct, the words in S. 18, sub-Cl. (1) "or in any other Court, subject to the superintendence of the Court" would be absolutely nugatory and of no effect because the power to stay proceedings pending against an insolvent before any Judge or Judges of the High Court is provided for in the first part of the section. The meaning put upon the word "Court" in the section by Mr. Justice Marten, however, is, in my opinion, not correct, in view of the definition of the word "Court" as used in the Presidency Towns Insolvency Act. S. 2 (h) defines the "Court" as the Court exercising jurisdiction under the Act, and S. 3 provides that the Courts having jurisdiction in insolvency under the Act shall be.

(a) The High Courts of Judicature at Fort William, Madras, and Bombay; and

(b) The Chief Court of Lower Burma.

Therefore, the Court exercising jurisdiction under the Insolvency Act is the High Court of Bombay and not an individual Judge thereof. S. 4 makes it quite clear. It provides that all matters in respect of which jurisdiction is given by this Act shall be ordinarily transacted and disposed of by or under the direction of one of the Judges of the Court, and the Chief Justice or Chief Judge shall, from time to time, assign a Judge for that purpose. I am, therefore, exercising this jurisdiction by reason of the Chief Justice having assigned me as the Judge for transacting and disposing of matters in insolvency. But I am exercising the jurisdiction which is given to the High Court under S. 3. S. 18, sub-Cl. (1), further makes it clear that the "Court" referred to therein is the High Court as the power is given by the first part of the section to stay any suit or any proceeding pending against insolvent before any Judge or Judges of the Court. The Judge or Judges of the Court are necessarily of the High Court and cannot refer to a single Judge, who by reason of being assigned for that purpose exercises jurisdic-

tion in insolvency. The District Court of Ahmedabad as much as any other District Court or Subordinate Judge's Court in the Bombay Presidency, is subject to the superintendence of the High Court. Therefore in the exercise of the jurisdiction of the High Court in insolvency, I have power under S. 18 to stay any suit or other proceeding pending against the insolvent in a District Court or Subordinate Judge's Court in the Bombay Presidency which is subject to the superintendence of the Bombay High Court.

The notice of motion thus fails so far as prayer (A) is concerned.

Coming to prayer (B) of the notice of motion the petitioning creditor has asked for that relief under S. 126. In my opinion as the order of this Court refusing to stay insolvency proceedings is under appeal, it would be futile to give any direction as prayed for by the executor of the petitioning creditor until the appeal is decided. If the appeal Court reverses the order of this Court, all insolvency proceedings in this Court will be stayed or annulled, and there would be no occasion to ask for the aid of the Ahmedabad Subordinate Judge's Court under S. 126. If the order of this Court is confirmed by the appeal Court the question will then arise, if no proper steps are taken for the transfer of the insolvency proceedings in the Ahmedabad Subordinate Judge's Court; to this Court as to how far the Ahmedabad Court should be asked to aid this Court in the insolvency proceedings under S. 126. The executor of the petitioning creditor may then renew his application on proper grounds. At present I do not see any use in giving any directions under prayer (B) of the notice of motion.

I, therefore, make no order on this notice of motion.

Motion discharged.

★ 1925 BOMBAY 547

MARTEN, J.

Coorla Spinning and Weaving Mills Company Ltd.—Plaintiffs.

v.

Vallabhdas Kallianji and others—Defendants.

Original Civil Suit No. 256 of 1922,
Decided on 21st March 1925.

(a) *Contract Act, S. 107—Sale must be within reasonable time.*

The sale by auction whether under the contract of the parties or S. 107 of the Indian Contract Act or otherwise must be within a reasonable time. The provision in a contract that "the company is at liberty to keep the said goods or resell them on our account and at our risk" cannot be construed as a power to keep the goods as long as the company liked before it resold. [P 550, C 2]

(b) *Contract—Breach of contract—Where date of sale is postponed by consent, old contract continues but date of breach is the postponed date if date is fixed, or the date when plaintiff refused to extend time or after reasonable time from last date of grant of indulgence.*

Where the time for performing a contract of sale has been postponed, at the request either of vendor or purchaser, and the contract is ultimately broken, this has the effect of deferring the period at which the breach takes place, and therefore alters the date with reference to which the damages are to be calculated. The old contract continues, but the date of the breach is shifted. The damages for non-delivery or non-acceptance of the goods will be calculated at the market price of such goods on the last day to which the contract was extended if a date was fixed, or at the date when the plaintiff refused to grant further indulgence, or at a reasonable period after his last grant of an indulgence. [P 551, C 1]

★ (c) *Contract Act, S. 107—Where vendor retains ownership he is entitled to difference between contract rate and market rate on date of breach, but must mitigate damages as far as possible—Where title has passed to vendee, vendor may recover price though vendee has not taken delivery or may sue for breach of contract even after resale of goods—In latter case damages are the difference between contract rate and market rate when contract ought to have been completed.*

If the property in the goods did not pass to vendee the measure of damages would normally be the difference between the contract rate and the market rate at the date of breach. It is undoubted law that a plaintiff who sues for damages owes the duty of taking all reasonable steps to mitigate the loss consequent upon the breach and cannot claim as damages any sum which is due to his own neglect. But the loss to be ascertained is the loss at the date of the breach; [Halsbury, X 332 (g) Diss.] If at that date the plaintiff could do something or did something which mitigated the damage, the defendant is entitled to the benefit of it. If the purchaser refuses to accept the goods, and the property has passed to him, the vendor may at his option consider the contract of sale as still unbroken, and recover their entire price in an action for goods bargained and sold, even though they have not been delivered. He may, on the other hand, after the time for acceptance has expired, or any other essential condition has been broken, sue for breach of the contract, even after he has resold the goods. In the latter case, the measure of damages is the difference between the contract price and the market price at the time when the contract ought to have been completed, for the seller may take his

goods into the market and obtain the current price for them. [P 551, C 2 P 554, C 1]

(d) *Civil P. C., S. 34—Interest on damages.*

Where a party improperly delays the ascertainment of damages for a long time he should be penalized by awarding interest from date of suit. [P 556, C 1]

★ (e) *Contract Act, S. 230 — Agent can sue in his own name if he has an interest in the contract.*

An agent may sue in his own name on contracts made by him on behalf of his principal in the following case, namely, where, as in the case of factors and auctioneers, he has a special property in, or lien upon, the subject-matter of the contract, or has a beneficial interest in the completion thereof. The proper person to bring the action is the person whose right has been violated. Though there are certain exceptions to the general rule, for instance, in the case of agents, auctioneers or factors, these exceptions are in truth more apparent than real. The real proposition of law, which these and other cases establish, is that where an agent enters into a contract as such, if he has interest in the contract, he may sue in his own name. Unless the contract, for the breach of which the action is brought is one made by the agent he has no cause of action because there is no privity between himself and the defendant. 24 *Mad.* 30 *Appr.* [P 558, C 1 & 2]

★ (f) *Contract Act, S. 140—The word 'invested' dispenses with necessity of assignment.*

The word "invested" is a strong one and coming as it does in a statute it would operate as a transfer to the surety of the creditors' rights without the necessity of any written assignment. [P 559, C 2]

(g) *Lim. Act, S. 22—Non-joinder.*

Joinder after limitation of proper but not necessary parties is not fatal. 22 *Bom.* 672 and 28 *Bom.* 11, *Appr.* [P 560, C 1]

Davar and Engineer—for Plaintiffs.

Lalji and Bhagvati—for Defendants.

Marten, J.—This is a suit brought by the plaintiffs under a contract dated October 6, 1920, in respect of the sale to the defendants of 75 out of a total of 101 bales of bed-sheets, which were "bunto" goods, and were to be delivered between November 1920 and February 1921. The original plaintiffs, when the suit was filed on January 19, 1922, were the present second plaintiffs, Messrs. Keshavji Manekchand & Co., They are the selling agents of the present first plaintiffs, the Coorla Spinning and Weaving Company, Limited, who were added as co-plaintiffs by my order of March 26, 1924.

It is common ground that on November 19, 1920, the defendants took delivery of six out of the 101 bales and paid for the same. The plaintiffs' case is

that at the instance of one Mohanlal Anandji, who was a partner of the defendants or who was acting on their behalf, they gave time to the defendants as regards the balance of the goods, and agreed that the defendants should take delivery in one lot of all the remaining bales that were turned out to the end of February 1921. They accordingly gave a notice dated February 28, 1921, to the defendants that 75 bales were ready, and forwarded a delivery order. Subsequently they say they saw Mohanlal who promised to take delivery shortly. Next, on March 21, they wrote saying that twenty more bales became ready by March 16, and requiring delivery to be taken of 95 bales in all by March 31. No written reply was received to either of these letters. Then, on April 8, they sent a solicitors' letter to the defendants calling on the latter to pay for the 95 bales and to take them up without further delay, and stating that if they were not paid for within seven days, they would be sold on their account or proceedings would be taken. It is alleged by the defendants that this letter was not delivered till April 12.

On April 13, the defendants in their letter of that date for the first time repudiated their liability, and claimed that the bales were tendered after the due date. On April 28, the plaintiffs wrote stating in effect that the course they had taken as regards the 75 bales was by arrangement with Mohanlal, and that those bales must be taken delivery of, but that if so desired the question of the twenty bales could remain open. On May 25, the defendants replied that Mohanlal was not a member of their firm, but was only a broker in the transaction, and had no authority to act in the way suggested. Subsequently, on June 27, after further correspondence the goods were sold by public auction. Then, on November 10, 1921, this plaint was declared, but for some unexplained reason it was not admitted till January 19, 1922.

The defendants' case is that the contract was with the first plaintiffs, the Coorla Mills Company, and not with their agents, and that accordingly this suit is barred by limitation, as the Mills Company was not added as a coplaintiff till after the expiration of three years from the date of the breach of contract in respect of which the suit is instituted.

Secondly, the defendants say that Mohanlal was not a partner of theirs, nor was he authorized to grant any extension of time, and that accordingly they are not liable under the contract as the plaintiffs were not prepared to give delivery within the contract period.

[The following issues were framed at the trial :

1. Whether the plaintiffs are entitled to maintain this suit.
2. Whether Mohanlal referred to in para. 3 of the plaint was a member of the defendant firm.
3. Whether plaintiffs gave intimation of the bales being ready to the said Mohanlal as alleged in para. 3 of the plaint.
4. Whether the said Mohanlal asked for time till the end of February 1921.
5. Whether the said Mohanlal had any authority to make such representations on behalf of the defendants.
6. Whether the 75 bales offered on March 1, 1921, were manufactured by the end of February 1921.
7. Whether the defendants were bound to take delivery of any bales offered on March 1, 1921, on a true construction of the terms of the contract.
8. Whether the defendants committed a breach of the contract.
9. If so, what is the date of such breach.
10. Whether the auction sale dated June 27, 1921, is binding on defendants.
11. Whether the plaintiffs suffered any and if so what damages.
12. To what relief, if any, are the plaintiffs entitled.
13. Whether the suit is barred by limitation.

After dealing with formal issues viz., 1 and 6. His Lordship discussed the evidence of both parties as to whether extension of time was granted at Mohanlal's instance and proceeded].

Under all the circumstances I am also satisfied that after the first delivery of six bales it was agreed through Mohanlal that instead of taking delivery of the remaining bales as they became ready, the defendants should take delivery in one lot of all the remaining bales manufactured up to the end of February 1921. Accordingly in my judgment the terms of the suit contract were varied in this respect. It may, therefore, be that, strictly speaking, this was not a mere withholding of delivery at the request of

the purchasers as in *Ogle v. Earl Vane* (1) and *Hickman v. Haynes* (2), but amounted to the substitution of a new contract, which in England might have required to be in writing having regard to the Statute of Frauds. No point, however, was made as to this before me, and its materiality would mainly seem to arise in considering the question of Mohanlal's authority.

In the result as regards Issue No. 7 I hold that the plaintiffs' letter and delivery order of February 28, 1921, were in time, although not received by the defendants till March 1. As the goods to be taken delivery of under the new arrangement were all those manufactured up to the end of February, it follows, in my opinion, that the plaintiffs would not be obliged to serve notice until February had expired, and the bales actually manufactured had thus been ascertained. My answer, therefore, to Issue No. 7 will be: "The defendants were bound to take delivery of the 75 bales offered on March 1, 1921, on the true construction of the suit contract as subsequently varied by the arrangement with Mohanlal." On the facts therefore, as found by me, I need not consider what would have been the position if the suit contract had not been varied. But I incline to the view that in that event the notice actually given would have been too late, as the schedule to the contract stipulated for delivery "from November to February," and not for manufacture throughout those months. Further, under Cl. 1, prior intimation had to be given to the defendants. Consequently to that extent the contract modified the terms of S. 93 of the Indian Contract Act.

I will next consider whether Mohanlal had the requisite authority from the defendants, and this brings me so Issues No. 2 and 5. [His lordship discussed the evidence on the point, and proceeded as follows:—]

After weighing then all the evidence, my conclusion is that Mohanlal's negotiations with the plaintiffs both before and after the ready contract and the suit contract were all effected with the knowledge and consent of the defendants, and that he was in these transactions their

partner or at any rate a fully authorized agent and not a mere broker. I accordingly answer Issue No. 2 "Yes, or else was a fully authorized agent of the defendants to act on their behalf in the manner alleged by the plaintiffs." And Issue No. 5 "Yes."

Under the above circumstances, I also hold that there was a breach of contract by the defendants, and that accordingly Issue No. 8 must be answered "Yes." This is not a case like that of the *Phoenix Mills Ltd. v. Madhavdas Rupchand* (3), where nothing at all was done by either party during the contract period. Nor is it like *Toyo Menka Kaisha Ltd. v. Chabildas Nathubhai* (4) where the plaintiffs failed in their attempt to prove that the time for delivery had been extended by mutual consent.

I next come to Issues No. 9, 10 and 11. The goods having been re-sold by auction, the suit is brought not for the price of the goods but (a) for the difference between the auction and contract prices under Cl. 2 of the contract or (b) alternatively for damages of the same amount or such other sum as the Court may deem fit to award. As regards (a), I am of opinion that the sale by auction whether under Cl. 2 of the contract or S. 107 of the Indian Contract Act or otherwise must be within a reasonable time; that the sale on June 27, 1921, was unreasonably late; and that consequently the plaintiffs cannot rely on Cl. 2 (see *Harichand and Co. v. Gosho Kabushiki Kaisha Ltd.* (5), nor on S. 107 as justifying this particular sale. The provision in Cl. 2 that "the company is at liberty to keep the said goods or re-sell them... on our account and at our risk" cannot, I think, be construed as a power to keep the goods as long as the company liked before it re-sold. I accordingly answer Issue No. 10 "No."

As regards the alternative claim (b): I think Issue No. 9 raises a question of difficulty as to the date of breach, viz., whether it should be taken to be within a few days of the service of the notice of February 28, 1921, say March 4, or else on or about March 31, when the notice of March 21 (Ex. 2) expired. This depends in the first place on whether I can accept

(1) [1868] L. R. 3 Q. B. 272 = 9 B. S. 182 = 37 L. J. Q. B. 77 = 16 W. R. 463.

(2) [1875] L. R. 10 C. P. 598 = 44 L. J. C. P. 358 = 32 L. T. 873 = 23 W. R. 872.

(3) [1916] 24 Bom. L.R. 142 = 69 I.C. 9.

(4) 1922 Bom. 203 = 24 Bom. L.R. 149.

(5) 1925 Bom. 28 = 49 Bom. 25 = 26 Bom. L.R. 921.

Ratilal's evidence to the effect that after the notice of February 28, 1921, he saw Mohanlal several times, and that Mohanlal promised to take delivery shortly. [His Lordship dealt with the evidence bearing on the point and concluded as follows :—]

In the result, I have arrived at the conclusion that Ratilal's evidence should be accepted in its entirety, and that having regard to Mohanlal's promises the plaintiffs showed further forbearance and withheld delivery voluntarily at his request. But this further extension unlike the original extension to the end of February is not proved to have been to a definite agreed date. In this respect accordingly the case resembles *Ogle v. Earl Vane* (1) and *Hickman v. Haynes* (2) already cited. The English Law on the point is thus stated in *Mayne on Damages*, 9th Edn., pp. 176-177:—

"Where the time for performing a contract of sale has been postponed, at the request either of vendor or purchaser, and the contract is ultimately broken, this has the effect of deferring the period at which the breach takes place, and, therefore, alters the date with reference to which the damages are to be calculated. The old contract continues, but the date of the breach is shifted. The damages for non-delivery or non-acceptance of the goods will be calculated at the market price of such goods on the last day to which the contract was extended if a date was fixed, or at the date when the plaintiff refused to grant further indulgence, or at a reasonable period after his last grant of an indulgence."

Under all the circumstances, then I hold that the plaintiffs' notice of March 21 giving a final ten days' time was a reasonable notice to give. I accordingly fix the date of the expiration of that notice, viz, March 31, as the date of the defendants' breach of contract [cf. *Hickman v. Haynes* and *Plevins v. Downing* (6)] The plaintiffs' subsequent letter of April 8 would not, I think, extend the date of breach in the absence of proof of any subsequent negotiations after March 31. I accordingly answer Issue No. 9 "March 31, 1921."

I next turn to Issue No. 11 which raises the question of quantum of damages. If the property in the

goods did not pass to the defendants, then putting aside Cl. 2 of the contract, the measure of damages would normally be the difference between the contract rate and the market rate at the date of breach: see *Jamal v. Moolla Darwood Sons & Co.* (7). And damages on that basis could be awarded without an amendment of the plaint even if the plaintiffs had only put forward the auction rate as the correct rate: see *Narasinggirji Mafg. Co. v. Budan Saheb* (8). In fact, however, in prayer (b) of the plaint the plaintiffs have claimed alternatively "such other sum" as the Court may deem fit to award as damages. In *Jamal's* case Lord Wrenbury, in delivering the judgment of the Board, says at p. 10:—

"The question, therefore, is the general question and may be stated thus: In a contract for sale of negotiable securities, is the measure of damages for breach the difference between the contract price and the market price at the date of the breach—with an obligation on the part of the seller to mitigate the damages by getting the best price he can at the date of the breach—or is the seller bound to reduce the damages, if he can, by subsequent sales at better prices? If he is, and if the purchaser is entitled to the benefit of subsequent sales it must also be true that he must bear the burden of subsequent losses. The latter proposition is in their Lordship's opinion impossible, and the former is equally unsound. If the seller retains the shares after the breach, the speculation as to the way the market will subsequently go is the speculation of the seller, not of the buyer: the seller cannot recover from the buyer the loss below the market price at the date of the breach if the market falls, nor is he liable to the purchaser for the profit if the market rises. It is undoubted law that a plaintiff who sues for damages owes the duty of taking all reasonable steps to mitigate the loss consequent upon the breach and cannot claim as damages any sum which is due to his own neglect. But the loss to be ascertained is the loss at the date of the breach. If at that date the plaintiff could do something or did something which mitigated the damage, the defen-

(7) [1916] 43 Cal. 493=43 I. A. 6=20 O. W. N. 105=80 M. L. J. 78=14 A. L. J. 89=19 M. L. T. 80=3 L. W. 181=23 C. L. J. 137= (1916) 1 M. W. N. 70=18 B. L. R. 315=31 I. C. 949=9 Bur. L.T. 8 (P. C).

(8) 1924 Bom. 390=26 B. L. R. 523.

(6) [1876] 1 O.P.D. 220=45 L.J.C.P. 695=35 L.T. 263.

dant is entitled to the benefit of it." Then dealing with Ss. 73 and 107 of the Indian Contract Act, his Lordship states as follows at p. 11:—

"The respondents further contend that Ss. 73 and 107 of the Indian Contract Act, or one of them, are in their favour. As regards S. 107 their Lordships are unable to see that it has any application in the present case. It deals with cases in which a seller has a lien on goods or has stopped them in transitu. The section follows upon sections dealing with those subject-matters. The present case is not one which falls under either of those heads. The seller was and remained the legal holder of the shares. As regards S. 73 it is but declaratory of the right to damages which has been discussed in the course of this judgment. . . The seller's loss at the date of the breach was and remained the difference between contract price and market price at that date."

That case has been followed recently in *Harichand & Co., v. Goshō Kabushiki Kaisha Ltd.*, (5) where the Court of appeal held that the vendors did not exercise their express power of re-sale within a reasonable time, and that consequently the correct measure of damages was the difference between the contract rate and market rate at date of breach and not the market rate at the expiration of a reasonable time in which the resale should have taken place. In that case delivery of fifty bales of yarn under a contract was to be given within sixty days of the arrival of a steamer, and in default there was an express power for the sellers: "at any time to sell the goods by private sale or public auction." Twenty-five bales arrived in Bombay on December 24, 1920, and the remainder on January 21, 1921. The purchasers took delivery of two lots of four bales each on January 14 and March 13, 1921, respectively. They then objected that these bales bore the Contract No. 10 instead of the original Contract No. 9/5, and so belonged to another contract with some different person. It was admitted that this number had nothing whatever to do with the quality of the goods. The seller's explanation was that it solely related to different numberings adopted by their Bombay branch as compared with their head office in Japan.

At the trial the main defence was

this question of numbering. I decided this point against the purchasers. I next held that there was a breach of contract by the purchasers in their letter of April 5, 1921, and that the express power of sale must be exercised within a reasonable time thereafter notwithstanding the use of the words "at any time." These particular findings were not challenged in appeal, and I may add that a somewhat similar question as to numbering has now been conclusively determined by the Privy Council in *Ramjivan v Bhikaji & Co.* (9). It was there held in effect that a first purchaser who is the owner of goods in the hands of a mill-owner can have any reference number, he likes, put on the bales provided it does not give any warranty or indication of the quality or description to his sub-purchaser or to others.

The next question in *Harichand's* case was whether the actual sale on May 21 was within a reasonable time. At the trial this point was argued by counsel briefly without any reference to authorities, and depended on the view taken of the correspondence. Practically throughout April correspondence had passed between the respective solicitors in which the purchasers maintained their erroneous point about the numbering. On April 26, the sellers wrote demanding payment within two days in default of which the goods would be sold. On May 2, the purchasers replied that they never had the idea of evading their liability, and that they would be quite prepared to take the goods provided they related to their contract, and they proposed that they would take the goods provided the sellers admitted they did not appertain to the purchasers' order and would make an allowance in the price on that account. Again, on May 6, the purchasers asked for the production of certain papers and correspondence and said that they had no desire to back out of the contract, and that if the proofs asked for were produced, they would pay for and take delivery of the goods without prejudice to their contention that they were not bound to take delivery as they did not relate to the contract. Subsequently, on May 17, the purchasers withdrew their offer, and the goods were re-sold on May 25.

(9) 1924 P. C. 143=48 Bom. 519=46 M. L. J. 655=26 B. L. R. 442=(1924) M. W. N. 430=35 M. L. T. 140=20 M. L. W. 424=5 L. R. P. C. 135 (P. C.)

The view I took of this correspondence was that having regard to the purchasers' letters of May 2 and 6, the sellers were not unreasonable in postponing the sale until the proposals made by those letters had been disposed of. But the view which prevailed in the appeal Court (see p. 928) was that though in view of the unreasonable nature of the purchasers' objection to accept the goods, some time might properly be allowed for the vendors endeavouring to get the purchasers to reconsider their refusal, yet that the vendors should have taken steps for a resale after receipt of the purchasers' letter of April 21, and that the sale should have taken place at any rate by April 29, i. e., after the expiry of the two days mentioned in the notice of April 26, and that consequently the negotiations made by the purchasers on May 2 and subsequently should be disregarded as they did not materialize, but that otherwise some time should be allowed for the time taken up in advertising the sale, etc., e. g., a week, such as ensued between the vendors' solicitors' letter of May 18 and the actual auction on May 25.

The case, therefore in effect depended on the difference of two or three days between April 29 and May 2, and this difference resulted in the vendor being unable to justify his actual resale, and being consequently thrown back on his ordinary remedy. Damages were accordingly calculated according to the market rate at date of breach. At pp. 928-29 Mr. Justice Fawcett said:—

"The result, in my opinion, is that plaintiffs cannot recover the whole loss resulting from resale of May 25, and are thrown back on their remedy of damages on the ordinary basis of the difference between the contract rate and the market rate at the date of breach. This date may be taken to be the day following the defendants' actual refusal in their letter of April 5, i. e., April 6, 1921. . . It is true that in *Prag Narain v. Mul Chand* (10) the measure for damages allowed was the difference between the contract rate and the market rate at the expiration of a reasonable time in which the resale should have taken place. But I agree with the following criticism of this decision in *Remfry's Sale of Goods in British India* (p. 406):—'But there seems to be no reason for a departure from the ordi-

nary rule. The right given to the seller includes the right to a reasonable time for effecting a resale, but if he does not exercise the power according to the terms of the section, there is no reason why he should obtain any benefit under it, and the due date should be the day on which to ascertain the market value.' The Privy Council decision in *Jamal v. Moolla Dawood Sons & Co.* (7) in effect says the same thing. In *Angullia & Co. v. Sassoon & Co.* (11) Harington, J. took the same view, and this Court agreed with him in *Narsinggirji Mafg. Co. v. Budansaheb* (8). We, therefore, allow this appeal and declare that the plaintiffs are entitled to recover damages from the defendants on the basis of the difference between the contract rate and the market rate of the goods on April 6, 1921."

So, too, at p. 933, Sir Lallubhai Shah said:—

"I do not read the judgment in that case (*Jamal's case*) as casting any doubt upon the proposition, which has been accepted in several cases to which I have referred that a clause as to resale gives a valid right to the sellers to claim the difference between the contract price and the price realized at the resale, provided that power has been exercised in accordance with the provisions of the clause. But where that power has not been exercised within the reasonable time, the only right of the sellers is to claim damages on the footing of the difference between the contract price and the market value of the goods on the date of the breach, without any reference to the price which might be realized by a resale at any time after the limit of reasonable time has been exceeded. My conclusion is that the defendants committed a breach of the contract on April 5 or 6, that a resale should have been effected soon after that—at the latest before the end of April—and that the subsequent negotiations and the subsequent resale cannot give the plaintiffs the right to claim damages according to the clause as to resale."

In both the above cases, however, the property in the goods did not pass to the purchaser. Does it make any difference then in the present case supposing the property did pass? This point was not referred to in the final arguments, which were all based on the assumption that if

(10) [1897] 19 All. 535=(1897) A.W.N. 150.

(11) [1912] 39 Cal. 568=13 I.C. 705=16 C. W. N. 593.

the auction sale was bad, the measure of damages would be the difference between the contract rate and the market rate at the date of breach. That assumption appears to me to be correct. On my above findings the plaintiffs cannot rely on S. 107 of the Indian Contract Act as the resale was unreasonably late. Consequently, as in *Jamal's* case (7), S. 107 does not apply, and we are left with S. 73. Accordingly the plaintiffs may sue for damages under S. 73, and prior to the resale they would also have had the alternative remedy of suing for the price, although the latter remedy is not mentioned in the Indian Contract Act (see *P. R. & Co. v. Bhagwandas* (12) and *Finlay Muir & Co. v. Radhakissen Gopikissen* (13)). The same result would, I think, follow under English Law, as the defendants had not actually received the goods. Thus, in *Mayne on Damages*, 9th Edn., at p. 168, I find it stated as follows:

"If the purchaser refuses to accept the goods, and the property has passed to him, the vendor may at his option consider the contract of sale as still unbroken, and recover their entire price in an action for goods bargained and sold, even though they have not been delivered. He may, on the other hand, after the time for acceptance has expired, or any other essential condition has been broken, sue for breach of the contract, even after he has resold the goods. In the latter case, the measure of damages is the difference between the contract price and the market price at the time when the contract ought to have been completed, for the seller may take his goods into the market and obtain the current price for them."

Accordingly in the view I take, the measure of damages would be the same in the present case whether the property did or did not pass. But if it is necessary to decide the point, I hold that the property did pass to the defendants. I think it clear that by their letter and delivery order of February 28, 1921, the plaintiffs appropriated these 75 bales to the contract (see *Pignataro v. Gilroy* (14)). I am further of opinion that this appropriation was assented to by the defendants

within the meaning of S. 83 of the Indian Contract Act, having regard to my above findings that Mohanlal asked for and was given time after the receipt of the plaintiff's letter and delivery order.

I should perhaps add that it was never contended before me that the effect of Cl. 2 of the suit contract was that the only remedies open to the vendors were either to keep the goods or to resell, and that having elected to resell and the resale being invalid the vendors could not rely on their alternative remedy. Nor was it contended that if the vendors elected to keep the goods, they were not entitled to damages in addition. In my opinion Cl. 2 does not have any such effect, and I only mention the points to show they have not been overlooked. The contract may be badly drafted, but I do not think that its language forces me to attribute to the parties such an improbable intention as the above.

As regards the actual market rates, I have already held in answer to Issue No. 9 that the date of breach is March 31, 1921, being the date on which the plaintiff's notice of March 21 expired. To save costs, the parties have very sensibly agreed that whereas the contract rate was at Re. 1-10-6 per lb., the market rates on February 28 and March 1 were Re. 1-8-0, on March 9, Re. 1-6-6, on March 31, Re. 1-6-0 and on April 13, Re. 1-6-3, and that the average rate obtained at the auction sale on June 21 was Re. 1-6-0. Also that the market rate on any date between March 1 and 9 should be taken to be Re. 1-7-3.

But it will be noticed from the passage which I have quoted from *Hari Chand's* case that the market was there taken as at April 6, being the date following the purchasers' actual refusal in their letter of April 5. Possibly it was assumed that this letter was not received till the 6th, though this does not appear from the appeal paper book. But I find on looking at the subsequent unreported proceedings, that the date finally adopted by the appeal Court was April 7 and not April 6, as April 6 was a close holiday.

Further, in Halsbury, Vol. X, p. 332, note (g), I find it stated:—

"The difference is more properly that between the contract price and the market price on the day after the breach, for the defendant has the whole of the day fixed for delivery on which to deliver."

(12) [1909] 34 Bom. 192=2 I. C. 475=11 Bom. L. R. 335.

(13) [1909] 36 Cal. 736=3 I. C. 185.

(14) [1919] 1 K. B. 459=88 L. J. K. B. 726=120 L. T. 480=24 C. C. 174=63 S. J. 265=35 T. L. R. 191.

Shaw v. Holland (15), is cited in support of this proposition, but in my opinion it does not bear it out. On the contrary as I read the decision the damages were based on the market rate of the last day of a seven days' notice given by a vendor to a purchaser to take delivery. The head-note ends :—

"In an action for the non-delivery of shares on a given day, pursuant to contract, the proper measure of damages is the difference between the contract price and the market price on the day when the contract was broken."

In that case, on March 3, 1845, the plaintiffs gave a notice which ended (p. 142) :

"If those scrips are not delivered to me on or before the 10th instant, I shall buy them in against you, and debit you with the difference."

Then at p. 146 Baron Parke said :—

"The question, therefore is, when it (the contract) was broken. Now the plaintiff, by his letter of March 3, gave the defendant until March 10 to deliver the shares ; and he is not, therefore, entitled to calculate the damages with reference to any amount the shares might have sold for subsequently to the 10th."

Accordingly the damages awarded in the lower Court were reduced on that basis.

In *Narsinggirji Mafg. Co. v. Budansaheb* (8) delivery had to be taken by December 31, 1919. In remanding the suit for a retrial, the appeal Court framed the following issue : "(2) If the breach of contract was by the defendant and not by the plaintiff, what was the market price of the goods on December 31, 1919?" And Sir Norman Macleod added :—

"The Court below has found that the contract time was not extended. If the defendant committed the breach, the plaintiff will be entitled to the difference between the contract rate and the market rate as found."

Presumably December 31, 1919, and also January 1, 1920, were close holidays, but in such a case the Court has to arrive at the rate as best it can by considering the rates available for the days nearest to the date of actual breach.

In the present case I appreciate

that as on my findings the property passed, and the defendants had the whole of March 31 in which to pay, the plaintiffs could not have safely gone into the market and resold these bales on March 31. But as I read the authorities already cited, the principle on which the date of the breach is taken is because it is the loss to the plaintiff on that particular date which has to be ascertained. As Lord Wrenbury emphasises in *Jamal's* case (p. 11) : "The sellers' loss at the date of breach was and remained the difference between the contract price and the market price at that date." That being so, it is really misleading to consider how soon in fact the vendors could reasonably have resold after the date of breach. The materiality of that would only arise if the vendors were validly exercising their powers of resale under Cl. 2 of the suit contract or S. 107 of the Indian Contract Act. In that event a week might well be spent if the sale was to be by auction and advertisements, etc., issued : cf. *Narsinggirji Mafg. Co. v. Budansaheb* (8).

But on my findings the vendors did not validly exercise these special powers, and consequently they can now only rely on their ordinary remedy. And one can well see that if some date after the date of breach was adopted, this might lead to disputes and difficulties as to what subsequent date should be adopted in any particular case, and that in a fluctuating market the difference of even a day might lead to serious differences in money. And as regards the mitigation of damages under S. 73, that again is at the date of breach. It is not suggested here that at that date there was anything special which the vendors should have done, but did not do, apart from the exercise of their power of sale which stands on a different footing.

Following then what I understand to be the principle laid down in *Jamal's* case and in *Narsinggirji Mafg. Co. v. Budansaheb* (8) I hold that I ought to take the rate of date of breach, viz., March 31, as the determining rate. This rate, as I have already said, is Re. 1-6-0 per lb. I accordingly answer Issue No. 11 "Yes." The damages should be calculated on the difference between the contract rate of Re. 1-10-6 and the market rate on March 31, 1921, of Re. 1-6-0 with reference to

(15) [1846] 15 M. & W. 136=4 Railw. Cas. 150=15 L. J. Ex. 87.

the 75 bales in suit." The aggregate sum representing this difference must be worked out as proper particulars were not given either in the plaint or at the trial, and the sum actually claimed includes interest.

As regards Issue No. 12, a question arises about interest. The plaint claims interest prior to the suit, but this cannot, I think, be allowed. As the sum awarded by me represents damages at date of breach, I do not think that Cl. 3 of the contract extends to interest on such damages. But interest from date of the suit stands on a different footing. In the subsequent unreported proceedings in *Harichand's* case, interest on damages was awarded by the appeal Court under S. 34 of the Civil Procedure Code from the date of the suit, and Mr. Justice Fawcett stated that in his opinion it was desirable that where a party improperly delayed the ascertainment of damages for three or four years, he should be penalized in this way, and that the main objection advanced by the defendants to take delivery had no substance in it.

47. In the present case the second plaintiffs declared their plaint on November 10, 1921, and filed it on January 19, 1922. So there was no unreasonable delay. Substantially they have been awarded the principal sum they claimed. They themselves paid it to the Mill Company in June and July 1921. They have now been out of their money for over three years, and in my opinion the defendants' main objection as to Mohanlal's want of authority is a dishonest defence. Under all the circumstances I think it fair and so hold that under S. 34 of the Civil Procedure Code the damages awarded should carry interest at six per cent. from January 19, 1922, when the plaint was filed down to the date of judgment.

In the issue (viz., No 13) the defendants rely on limitation. This issue was not raised until the second hearing when the Mill Company had been added as a co-plaintiff, and an amended written statement pleading limitation had been put in. It depends primarily on what was the date of breach and that is why I have set out at length my reasons for adopting March 31, for the difference in money values is comparatively small. The material dates are as follows: I have

already found that the date of breach was March 31, 1921. My order directing the Mill Company to be added as a co-plaintiff was made on March 26, 1924. The amendments to the plaint actually adding them as parties were made on March 28, and the amended plaint was formally re-declared by Ratilal on March 31, 1924. Under these circumstances I hold that the joinder of the Mill Company as plaintiffs was within time, viz., three years of the date of breach, and that accordingly Issue No. 13 should be answered "No."

Apart, then, from any question of costs, it is unnecessary for me to decide the points of law which would arise if the date of breach was found to be earlier, say March 4, 1921. But in deference to the able and interesting arguments of counsel, and as in general it is desirable for a trial Judge to give his decision on all important disputed points, I will now consider this issue on the assumption that (contrary to the view which I hold) the Mill Company was not added as a co-plaintiff until more than three years had expired from the date of breach. In the first place, I reject the plaintiffs' contention that the suit contract was with the selling agents alone. It may be taken in the plaintiffs' favour—and I so hold—that the contract Ex. A alone should be looked at, and that the other document Ex. A 1 which is not signed by anybody and has no rubber stamp endorsement by the agents is not a duplicate, but is only a copy of part of the original contract.

Now Ex. A is a printed form in a contract book which is supplied by the Mill Company to the selling agents. In the printed body of the form no other company but the Mill Company is referred to. Clauses 3 and 5 expressly refer to the company's "Mill," and it is not suggested that the agents have any mill. I think, therefore that in Cls. 1, 2, 3, 5 and 6 of Ex. A the references to "the company" are clearly to the Mill Company, and that having regard to the nature of those clauses, it cannot be successfully contended that the Mill Company was merely a third party. For instance, under Cl. 2 it was "the company" who on the purchasers' default had the power either to keep or to re-sell the goods and to recover damages on a re-sale. Under Cl. 5 the company had a conditional power to cancel the contract, in which

case the purchaser was not to get any compensation from the company.

Plaintiffs' counsel laid stress on the rubber stamp endorsement bearing the agents' name; and also on the printed statement in the contract that the defendants "have this day agreed to purchase from the Coorla Spinning and Weaving Company Ltd.'s shop (Dookan) for selling cloth situate in the new cloth market the below-mentioned goods..." This is an ambiguous and stupid form, and I hope that at any rate one result of this case will be to ensure that the plaintiffs adopt another form in the future. Strictly speaking you can buy "at" a shop, or "from the proprietors of a shop," but not "from a shop." The distinction is between the place and the persons; but sometimes the word 'shop' is used as including or referring to the goods in a shop. The difficulty here is that although the goods manufactured by the Mill Company are sold at this shop, the proprietors of the shop are the selling agents, and not the Mill Company. Possible in some bygone days the Mill Company kept their own shop, and this form was in use then and has not since been altered, but this is mere guess work for there is no evidence of it. And if the contract is intended to be with the persons who keep the shop where the Mill Company's goods are sold, then this is inconsistent with the body of the contract which refers to the Mill Company alone, unless one treats such persons as contracting agents for the Mill Company.

In this respect the rubber endorsement is helpful and shows that the contract was at any rate effected by the aid of the selling agents, just as an application for shares in a company by a member of the public might bear a banker's or broker's stamp. But although it contains the words "& Co.," I do not think this involves a reference to the selling agents in the body of the contract where the words, "the company" are used. The agents were not a company in the ordinary sense of the word, and would not, I think, be referred to as such. Ratilal tells us that the reason for the rubber endorsement was to show that the purchasers were to credit the selling agents and not the Mill Company on delivery of the goods, and that they might know that the contract was with the selling agents. All people in the market knew that they were the

selling agents of the Coorla Mills, but some outside merchants might not know this. And though the defendants have not put their books in evidence to show whom they gave credit to for the ready bales and the six delivered bales, it seems clear that they transacted all business with the selling agents throughout, and not with the Mill Company. But this observation and also Ratilal's statement may perhaps be open to the objection that it is parol evidence as to the intention of the parties under a written contract (see *Bowstead on Agency*, 6th Edn., Art. 119, p. 405) and I think it safer therefore to disregard it.

On the whole I think the true view is and I so hold that the contract was with the Mill Company acting by their selling agents. In much the same way a club often executes its contracts by a named agent, e. g., its secretary. And in effect the view adopted by both parties in the initial correspondence is not very different. In their letter of April 8, 1921, the vendors' solicitors write: "On behalf of our clients Messrs. Keshavji Manekchand & Co., selling agents of the Coorla Mills." In the reply of April 13 the defendants' solicitor writes: "By the contract referred to...your clients agreed to deliver to ours..." I further hold that under all the circumstances the rubber endorsement had the effect of a signature on the contract by the selling agents as such and acting on behalf of the Mill Company. In this respect it will be borne in mind that but for this rubber endorsement there was no signature by or behalf of the vendors either in Ex. A or Exh. A 1.

Counsel were unable to assist me with any authorities in arriving at this conclusion, but the contract is I hope sui generis, and accordingly one could not expect to find a case in point. The converse case of the personal liability of an agent in various instances has recently been the subject of much litigation in the English Courts, culminating in the decision of the House of Lords in *Universal Steam Navigation Co. v. James Mc. Kelvie & Co.* (16) but the facts are too different from the present case to afford much assistance.

Turning again to the suit contract, this signature by the selling agents would not, I think, necessarily allow the selling

agents to sue on the contract without joining the Mill Company, having regard to the terms of the body of the contract. That being so, I see no reason to alter the opinion which I formed on March 26, 1924, that it was desirable that the Mill Company should be added as a complainant. I thought the case was one where their presence before the Court *may* be necessary in order to enable the Court effectually and completely to adjudicate upon and settle all the questions involved in the suit," within the meaning of the second branch of O. 1, R. 10 (2). I lay stress on this word 'may.' It should be contrasted with the first branch of the section, viz., "any person who ought to have been joined." The effect of the decided cases on this sub-section appears to be that the first branch refers to necessary parties and the second to proper parties.

It was next argued on behalf of the defendants that the suit was defective and must have been dismissed unless and until the Mill Company was added. In other words, that the Mill Company were necessary and not merely proper parties. The plaintiffs, on the other hand, contended that the selling agents had here a beneficial interest in the completion of the contract, and could accordingly sue in respect of it. This rule extends in England to auctioneers and factors, and is thus expressed in *Bowstead on Agency*, 7th Edn., p. 431 :—

"An agent may sue in his own name on contracts made by him on behalf of his principal in the following case, namely... (b) where, as in the case of factors and auctioneers, he has a special property in or lien upon, the subject-matter of the contract, or has a beneficial interest in the completion thereof,"

Williams v. Millington (17) ; *Robinson v. Rutter* (18), and *Consolidated Co. v. Curtis & Son* (19) ; may be referred to in this connexion.

Similarly in India Sir Arnold White in *Subrahmanya Pattar v. Narayanan Nayar* (20) says as follows (p. 135) :—

"He (Willes, J) says the proper person to bring the action is the person whose right has been violated. Though there

are certain exceptions to the general rule, for instance, in the case of agents, auctioneers or factors, these exceptions are in truth more apparent than real, etc. The real proposition of law, which these and other cases establish, is that where an agent enters into a contract as such, if he has interest in the contract, he may sue in his own name. Unless the contract for the breach of which the action is brought is one made by the agent he has no cause of action because there is no privity between himself and the defendant."

It may be that in that particular case this was obiter because it was held on the fact that there was no privity between the plaintiff and defendant and that accordingly the plaintiffs failed on that ground alone. But the comment on the case in *Pollock and Mulla*, 4th Ed., p. 742, 5th Edn., p. 722, is :—

"This is not a real exception to the rule laid down at the beginning of the section, the agent being in such case virtually a principal to the extent of his interest in the contract."

The section in question is S. 230 of the Indian Contract Act which runs :—

"In the absence of any contract to that effect, an agent cannot personally enforce contracts entered into by him on behalf of his principal, nor is he personally bound by them."

Then follow certain specific exceptions which do not apply here.

59. As regards the question of fact whether the selling agents had here a beneficial interest in the completion of the contract, I find that point in favour of the plaintiffs. The details of the agency terms are not perhaps as full as they might be, partly because Mr. Bhagvati very prudently did not cross-examine to bring them out. I think, however, it is sufficiently proved that the terms of business were that the agents were remunerated by commission, but that they took delivery from the Mill Company and were debited by the Mill Company with the price of the goods, and that they in their turn delivered the goods to the purchaser and were paid by the purchaser. As the delivery and payment of the six bales were admitted, the details were not gone into, but in the concluding stages of the trial counsel for the defendants admitted that the delivery order for the six bales was in the same form as

(17) [1788] 1 H. Bl. 81=2 R. R. 724.

(18) [1855] 4 El. & Bl. 954=24 L. J. Q. B. 250=1 Jur N. S. 823=3 W. R. 405.

(19) [1892] 1 Q. B. 495=61 L. J. Q. B. 325=40 W. R. 426=56 J. P. 555.

(20) [1900] 24 Mad. 130.

that sent on February 28, 1921 (Ex. C 1), which was signed by the selling agents and addressed to their own godown-keeper. I further find that normally the delivery by the Mill Company to the agents would be at or about the same time as the latter were to deliver the goods to the purchaser. But if the purchaser failed to complete, then I think the loss, if any, would fall on the selling agents in cases where they had once accepted or taken delivery from the Mill Company. For instance, in the present case the Mill Company eventually delivered the bales to the selling agents at the time when the auction sale took place. On the other hand the selling agents were debited with the suit contract price of the goods and not with the price realized at the auction. Consequently they stood to lose by the amount of the difference between the contract price and the auction price.

It was at one time contended that the agents never in fact paid the company the contract price. But it became clear from the accounts produced that at the date of the auction the selling agents were largely in credit with the Mill Company, and that in fact their account still remained in credit after the contract goods had been debited to them. Accordingly in the concluding stages of the trial it was admitted by the defendants' counsel that this amounted to payment by the selling agents to the Mill Company. Shortly stated, therefore, I hold that the selling agents were in the position of del credere or guaranteeing agents, and that on the defendants' default they paid their principals, the Mill Company, the amount due by the defendants.

I quite appreciate that there is no express assignment here of the Mill Company's right to damages for breach of contract. Even if there had been, the question would still remain whether it would not be wise to add the assignor as a party. I do not wish to go into English practice for there is a difference there between what is made assignable by the Judicature Act and what is assignable in equity. But I may refer to the judgment of Lord Macnaghten in *Tolhurst v. Associated Portland Cement Manufacturers* (1900) (21), where at p. 420 he said as follows:—

"It is well settled that as a general rule the benefit of a contract is assignable in equity and may be enforced by the assignee. The assignor ought in ordinary circumstances to be made a party. But I cannot think that this is necessary when the assignor is a mere name, as the Imperial Company is in the present case, without any means and without any executive or board of directors, if indeed it has now any corporate existence at all. I am not aware of any authority for this proposition, but it seems to me to be in accordance with the practice in equity and it is supported by what was said by James, V.C., in *Castellan v. Hobson* (22)."

In the above case the Imperial Company had sold its undertaking to an amalgamated company, and then gone into voluntary liquidation, its affairs being wound up and its assets distributed.

In the present case the Mill Company is still a going concern, but at the date when the suit was filed, the selling agents had long since paid the Mill Company for the contract price of the goods, and so prima facie they would be entitled in equity to an assignment of the Mill Company's rights under the suit contract. And I think they can put their case higher than this. They were in the position of sureties who had paid all they were liable for. Consequently, upon such payment, the selling agents "were invested with all the rights which the creditor had against the principal debtor" and became entitled to the benefit of every security held by the creditor (see Ss. 140 and 141 of the Indian Contract Act). I have not been referred to any authority on S. 140, but the word "invested" seems to me a strong one, and coming as it does in a statute, I do not see why in a case like the present it should not operate as a transfer to the surety of the creditors' rights without the necessity of any written assignment. If so, then one of those rights would be to damages for breach of contract. In that event, there is some authority for holding that even in England if there has been an assignment the surety could sue in his own name (see Halsbury, Vol. XV, p. 506 Art. 956), although in general a del credere agent may not be able to do so (see *Bowstead on Agency*, 6th Edn., P. 432).

(21) [1903] A.C. 414=72 L.J. K.B. 834=89 L.T. 196=52 W. R. 143=19 T. L. R. 677.

(22) [1870] 10 E.L. 47=39 L. J. Ch. 490=22 L. T. 575=18 W. R. 731.

But however that may be, it is, I think, clear that at the date of the suit the sole beneficial interest was in the selling agents, and that the Mill Company were only nominal parties, and were in a position resembling that of a bare trustee. On the other hand, it was desirable for the protection of the defendants that the Mill Company should be added so that the defendants should not be exposed to any separate claim by the Mill Company, and that the matter should be adjudicated upon once and for all.

Under those circumstances if it had been necessary for me to decide the point, I should have been disposed to hold that the Mill Company were proper rather than necessary parties, and that, following the principle of the decisions of this Court in *Ravji v. Mahadev* (23) and *Guruvayya v. Dattatraya* (24), the suit was not barred merely because the Mill Company was not added until after the period of limitation had expired. In the former case it was held that a suit brought originally by a benamidar was not barred on the ground that the person for whom he was a benamidar was not added until after the period of limitation. In the latter case an ejectment suit brought by the manager and one other member of the joint family was held not to be barred merely because other members of the family were added after the period of limitation. Those cases are no doubt distinguishable from the present

one but they show what view our Courts have taken of S. 22 of the Indian Limitation Act, and S. 32 of the Civil Procedure Code, and no case exactly in point has been cited to me.

In the view, therefore, which I take, the defendants fail in any event in their defence of limitation. But I may add as a word of warning that Bombay Mill Companies and their selling agents would be well advised to see that their selling contracts are free from ambiguity as to who the real vendors are, and that in many cases, to avoid legal difficulties, it may be advisable for both parties to sue as co-plaintiffs, as indeed was the case with the suit brought by the Mathuradas Mills, Ex. K 1. In the other case, Ex. No. 6, the position was clear and the suit was brought by the Sassoon Mills alone.

There will accordingly be a decree for the plaintiffs for an amount and interest thereon to be ascertained in accordance with my answers to Issues Nos. 11 and 12. As regards costs the, defendants will pay the plaintiffs' costs of the suit throughout except that the plaintiffs are to pay the costs of adding the Mill Company and the defendants' costs of the hearing on March 26, 1924, and of and occasioned by the adjournment ordered on that day, including their amended written statement, and there will be the usual set off of costs. There will be interest on judgment at six per cent.

Suit decreed.

(23) [1897] 22 Bom. 672.

(24) [1903] 28 Bom. 11=5 Bom. L. R. 618.

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Dated --- 14-11-24

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